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THE LAW OF INSURANCE.

[Next to the decisions of judicial tribunals, the opinions of eminent counsellors upon important questions submitted to them for their advice, are undoubtedly deserving the highest consideration. Opinions of this kind are often drawn up with equal care, and with feelings of responsibility quite as deep, as those which are prepared by learned judges acting in the discharge of their public duties; and generally, although the motives for accuracy may not be so urgent, a counsellor of character seldom gives his written opinion upon an important enquiry, until he has given the subject a thorough investigation. We have on hand a large number of opinions drawn up by distinguished members of the bar, upon the application of their clients, from which we intend to make selections from time to time as our limits may permit. The three first of the following opinions, embracing different subjects in the Law of Insurance, are worthy of great attention, not only from their intrinsic merits, but also from the character and standing in the profession of the gentlemen who prepared them; and no less can be said of the opinion in the case of the ship Molo, as the skill and experience of the insurance broker by whom it was drawn up, are well known. — Eds. Law Rep.]

CASE OF THE SHIP LANCASTER.

A whaling ship owned by Messrs T. and A. R. Nye, and insured by the Merchants Insurance Company, in New Bedford, was compelled to put into one of the Sandwich Islands to repair damages sustained from perils of the seas, and, there being no other equally capable men, the crew were employed in unloading and reloading the vessel, and in making the repairs which are usually made by carpenters, caulkers, and other material men where they can be procured. The master, estimating their services as such mechanics' labor, paid them wages accordingly, amounting to about $600. And the enquiry is whether this sum is legally chargeable to the insurers in making up a particular average.

OPINION.

This question has not, that we are aware of, been judicially decided, although it must have often arisen; and the reason probably is, that as in most cases the wages of seamen are payable in money, which may be considered an equivalent for their services, they have not thought it just or expedient to seek for more. That reason does not exist in the present case, where their compensation is in shares of the catchings and all time and labor expended in repairs is of course not paid for, unless made the subject of pecuniary reward. We have, however, been long under the impression that the seamen are, in all cases, entitled to extra compensation for extra services. And that, although they can claim nothing for their time because, by the terms of the contract, they are bound to stay by the vessel, nor any thing for ordinary ship's duty, they may demand suitable reward for other labor, for which the owners receive the benefit, and for which they would have otherwise been compelled to pay other persons, in the ordinary course of such repairs. We do not of course mean, *that extra exertions* in the course of ship's duty at sea, or in port, are to be thus compensated; but only such as are without the scope of such duty, according to the *usages* of the same.

Although, as above remarked, no judicial decision confirms this view, we find the principle recognised by Benecke, page 463, a very sensible writer: and cited or rather republished by Mr Phillips in his edition of Benecke and Stevens, page 390, without comment: whence we may infer his assent to the doctrine. It is also sustained by the analogy of salvage allowed to the crew, as may be seen in Story's Abbot on shipping, page 402, note, Edit. 1829 — 1 Pet. Adm. R. 306, in cases of service beyond the line of their duty. And it seems to us very clear on strict common law principles, which are far less liberal in such matters than are those adopted by courts of admiralty in reference to seamen.

We feel great confidence, therefore, in advising that the seamen are entitled to com-

pensation in this case, for such services rendered by them, *as are not usually performed by the crew in such cases.* We cannot, however, with our limited knowledge of the usages, undertake to decide upon the particular items. It is, however, very clear that the crew are bound to load and unload the vessel at her ports of lading and delivery; and that, if the like obligation exists at ports of necessity, they are not to be paid for that service. But we think it equally clear, that they are not bound to do the work of mechanics and laborers in making repairs, which is usually done by others. And if the usage is for the crew to unload and reload, in such cases the natural inference would be, that such labor is not included in that here paid for. We suppose that experienced masters, knowing the work done and the expenses of it in those ports, may readily decide upon the reasonableness of this charge, and of course we should advise a reference to their opinions if no other means exist of determining it. We are further of opinion that the same principle would govern if it should appear that no other persons could be found to make the repairs; for the benefit to the owners is the same, and they should pay for it by whomsoever rendered, provided that it be one which seamen do not ordinarily perform; and under such circumstances the case would more nearly resemble the analogy of salvage above referred to.

We have been called upon to give this opinion suddenly, and have not been able, therefore, to put it in the form which more time and care might have enabled us to do; but we do not consider any further time necessary to enable us to pronounce one on the question submitted, having entire confidence in these views.

LORINGS & DEHON.

Boston, July, 1837.

CASE.

A SHIP insured by a policy in the usual form adopted in this city, and by which *the risk of barratry, where the insured is owner of the vessel is excepted,* was burned by fire kindled in the cabin for the purpose of expelling rats, with which she was greatly infested. It is not known at present whether the loss is attributable to mere accident, or to gross negligence or carelessness: and the inquiry is whether in either case the insurers are liable.

OPINION.

The only ground suggested for exonerating the insurers, should it appear that ordinary care was exercised, and that the loss is not imputable to gross negligence, is, that as they would not be liable for a loss occasioned directly by rats, they ought not to be so considered for one immediately owing to means taken for their destruction; and which would not have taken place otherwise. But we apprehend that this position is not tenable.

In the first place it is not as yet determined judicially, that insurers are not responsible for losses by leakage, or foundering, occasioned by holes made by rats, when the vessel, at the inception of the policy, was not so infested as to be unseaworthy, and due diligence had been used to guard against them. This precise question does not seem to have been directly decided: and contrary adjudications have taken place on the subject in England and this country. The better opinion, however, seems to be that such a loss is not within the perils insured against.

But if it be taken for granted that insurers are not answerable for such a loss, it by no means follows, as we think, that they are not for losses occurring by a peril included within the terms of the policy, and occasioned by proper means taken to destroy the vermin. It seems to us precisely like the case of a loss happening to a vessel undergoing repairs for which the insurers are not chargeable, and to which loss they would not have been otherwise exposed. For instance, if a vessel, whose seams needed caulking by reason of age or ordinary wear and tear, or whose copper was worn out, were hove down, or put upon a railway to be repaired, and there destroyed by fire or a tempest, and would not otherwise have been exposed to the peril, there can be no doubt that the insurers would be liable, although they would not be chargeable for such repairs, nor liable for any loss that might have accrued by any omission to make them.

The true principle is, that the vessel is protected by the policy in all situations in which she may be properly placed during its continuance; and the means taken to destroy

vermin are one of the emergencies to which, in her ordinary course of her employment, she may be expected to be exposed.

If, therefore, it should turn out that ordinary care and diligence were used, and that the communication of the fire was owing to mere accident, we are of opinion that the insurers are answerable for the loss.

But should it appear that there was gross carelessness, or neglect, a new and very interesting question would arise. By the decisions, *Busk v. Royal, Ex. Ass. Co.* (2 B. and Al. 73.) *Walker and Maillaud,* (5 Same, 171.) *Shore v. Bentall,* (7 B. and C. 798, note.) *Bishop et al v. Pentland,* (7 B. and C. 219,) it seems to be now settled in England, that when the policy covers the risk of barratry, the underwriters are liable for a loss, the proximate cause of which is one of the risks enumerated, although it may be traced to the negligence of the master and crew, and this is the doctrine held by the supreme court of the United States in *Patapsco Ins. Co.* v. *Coulter,* (3 Peters' S. C. Reports, 222.)

In all these cases, however, it is to be observed, that express reference is made to the fact, that in the policies then under consideration, the barratry of the master was one of the risks assumed; and it is argued, that even if the negligence proved, did not amount to barratry, as it would if excessive, still it must be inferred, that if insurers intended to incur the risk of the fraud and voluntary misconduct of the master and mariners, they must of course be presumed to have also intended to incur the risk of their negligence and carelessness. But this inference, it is manifest, cannot be drawn, and the argument therefore does not hold in cases like the present, where the barratry of the master and crew are not insured against. And in the case of the *Patapsco Ins. Co. v. Coulter,* the court explicitly say, that they do not decide the question, whether the insurers would be liable for a loss by negligence when barratry is not insured against—pages 234, 236, and add, that negligence itself, when gross, is evidence of barratry. And, that no mistake may exist, they state the rule thus, " We cannot but think that the British courts have adopted the safe and legal rule in deciding that, *where the policy covers the risk of barratry and fire be the proximate cause,* they will not sustain the defence that barratry was the remote cause."

It seems to us, however, to follow from the general reasoning in all these cases that, independently of the consideration that the risk of barratry was included in the policies then under consideration, the courts would have come to the same conclusion, and that it may be considered as established in England, at least, that insurers are liable for a loss the proximate cause of which is a peril insured against, although that may be directly traced to the negligence or carelessness of the master and crew — they being competent for their stations when appointed: and we think too, that the Supreme Court of the United States would, from the principles and reasoning of the case above cited, come to the same conclusion, although they most studiously confine their opinions to the case then on hand, in which barratry was one of the perils insured against, and take special pains to exclude any implication of what would otherwise be their judgment. A contrary doctrine, however, is held in New York, where it has been expressly decided, that insurers are not liable for loss by fire caused by the negligence of the master and crew. *Grim v. Phœnix Insurance Company,* (13 Jons. R. 451.) And there are various adjudged causes in England and this country in which it has been held that underwriters are not liable for losses arising from gross mistakes or ignorance of the master. *Phyn* v. *Royal Exchange Assurance Company,* (7 T. R. 501.) *Cleveland et. al. v. Union Insurance Company,* (8 Mass. 308.) and in the last case the Court say, page 322, " It is the duty of the owner to see that he intrusts the property insured with a man of competent skill, prudence and discretion. He is responsible for all losses or damage to the goods committed to his charge which arise from his *ignorance, negligence* or wilful misconduct: *and as he is responsible to the owner in all such instances the underwriter is not in any of them, excepting only in such cases of wilful misconduct as amounts to barratry,* when that is especially insured against by the underwriters." " Herein is the principle, that the underwriters shall answer for no losses resulting from the gross negligence or ignorance of the master, or from the want of a competent crew."

The language of this case would cover the doctrine as established in New York; but perhaps the facts do not constitute it an authority in point,— and a distinction between

it and such a case is attempted to be established by the supreme court of the United States in the case just cited from 3 Peters, on the ground that the omission to take the register was in the nature of a misfeasance rendering the vessel unseaworthy, or unfit for the voyage so far as the risk of capture was involved,— page 235.

Such being the condition of the question upon the adjudged cases — those in England and the United States court being all upon policies in which barratry was included, and that circumstance being in most of them much relied on by the court, and those in New York being in distinct opposition; and our own court having expressed themselves in broad language seemingly in unison with the latter; — it is not possible to say, with certainty, what would be the decision here. We incline, however, strongly to the opinion that our courts would adopt the doctrine of the English courts, and of the United States supreme court and hold that insurers are liable for losses occasioned immediately by a peril insured against, although it may be traced to the mere negligence or carelessness of the master and crew, supposing them to have been competent to their stations when appointed. But if such negligence or carelessness be *very gross*, it would, according to the principle of the supreme court of the United States, as above stated, amount to barratry, and the insurers would be *exempted by the terms of our policies.* Indeed as the most cautious are sometimes guilty of negligence which may be the *occasion of the* operation of a peril,—it seems essential to the indemnity intended that the proximate cause be alone referred to.

Upon the whole, therefore, we advise, that if ordinary care and diligence were exercised, and the loss is attributable to mere accident, the insurers are clearly liable. That if the loss was occasioned by ordinary negligence or carelessness, viz. such as men of common intelligence and discretion are, in the ordinary course of business, sometimes guilty of — we apprehend that the insurers will be held responsible, although the question, as above shewn, is not free from doubt.

But that, if it was owing to gross carelessness or negligence such as men of common intelligence and discretion cannot, according to usual experience, be supposed ever guilty of,—the insurers are not liable.

Boston, March, 1838. LORINGS & DEHON.

CASE.

THE Columbian Insurance Company, by a policy dated 6th May 1835, insured R. Hooper, Jr. $30,000 on property on board vessel or vessels at and from Smyrna to Constantinople, &c. to port of discharge in the United States, (the Turkish piastre valued at six cents, premium included,) at a premium of one and a half per cent.

The New England Marine Insurance Company by a policy dated 9th Nov. 1835, insured R. Hooper, Jr. $10,000 on board brig Solicito at and from Smyrna to port of discharge in the United States. The policy contains this clause — "a portion of the property being insured in the Columbian office, No. 3317, this policy is to attach simultaneous with that insurance." In point of fact the whole of the property insured in each of these policies is the same.

The real par value of the piastre is less than six cents. The property was totally lost at sea, and at the valuation above it amounted to $26,753. The President and Directors of the Columbian Insurance Company are desirous to know whether they have any, and what claim for contribution against the New England Insurance Company in case the former are obliged to pay the whole amount of the loss.

OPINION.

Each of these policies, contains the usual clauses —" and it is hereby agreed, that if the assured shall have made any other assurance upon the property aforesaid, prior in date to this policy, then this company shall be answerable only for so much as the amount of such prior insurance shall be deficient towards fully covering the property at risk, whether for the whole voyage, or from one port of lading or discharge to another." — " and in case of any insurance upon the said property, whether it be for the whole or a part of the voyage, subsequent in date to this policy, the said Insurance Company shall nevertheless be answerable, to the full extent of the sum by them herein insured, without right to claim contribution from such subsequent assurers."

Now the declaration contained in the policy of the New England office that "this policy is to attach simultaneous with the former policy," is manifestly intended to p-ply to and affect these clauses, by taking '

contract out of the description of a prior or subsequent insurance. Of course it renders the second insurer liable to the insured for the whole amount insured by the policy, and not for the whole amount unprotected by the prior insurance, and this is important to the rights of the insured. But it also renders nugatory the stipulation that the first insurer shall not call upon any subsequent insurer for contribution, and the only party affected by this is the first insurer, who is thus put in a condition to require contribution from the second. It seems to us, that this declaration as to the simultaneous character of the policies must have been inserted both with reference to the rights of the insured and of the first insurers, whose policy is referred to, and that it was intended by the parties thereby to give to that first insurer a right to call on the second for contribution.

The only remaining question is to what extent the second insurer is to contribute. It is a familiar rule that "equality is equity," — but this rule does not apply where it is manifest, from the contracts of the parties, that they did not intend to take upon themselves equal shares of the common burthen. Such an intent is considered as manifested by a difference in the sums for which the different parties contract, and we think there can be no doubt that the proportions in this case are, three fourths to be borne by the Columbian Insurance Company, and one fourth to be borne by the New England Marine Insurance Company. This, however, leaves an exceedingly difficult question to be settled, viz. is the New England Marine Insurance Company to contribute only one fourth of the actual value of the property, or one fourth of the value as derived from the estimate of the piastre at six cents.

We confess that we have entertained great doubt as to this question, and have felt considerable difficulty in coming to a decision. But after careful consideration we have come to the conclusion, which is satisfactory to our own minds, that the piastre is to be valued at six cents in estimating the value of the property, and that the New England Marine Insurance Company should contribute one fourth of the value thus ascertained. By inserting the clause as to the simultaneous insurance in their policy, the New England Marine Insurance Company do, in effect, agree that the Columbian Insurance Company shall have the right to require them to contribute their proportion of the common burthen. But what is the common burthen? Clearly the value of the property lost. That value is ordinarily to be ascertained by reference to the invoices, but in this case the invoices are made up in a foreign coin, the value of which is ascertained and fixed in the policy of the Columbian Insurance Company. When, therefore, the New England Marine Insurance company do, by their policy, refer to the prior policy of the Columbian Insurance Company and undertake to make the burthen assumed by that policy, to some extent common to that company and themselves, it seems to us that they also agree that the nature and amount of that burthen which they thus assume to share with the Columbian Insurance Company, shall, when viewed as common, be ascertained and determined according to that standard which has been fixed upon in the contract to which they refer. It is manifest, that if this rule is not adopted the burthen will not be a *common one*, in the most essential particular, viz. *the value of the property.* It would be one thing to the Columbian Insurance Company and another and a very different thing to the New England Marine Insurance Company; so that although they agree to insure one fourth of the whole amount insured, they would, in fact, bear much less than one fourth of the burthen. This would seem to be inconsistent with that principle which apportions the burthen in proportion to the sums for which the parties respectively contract.

We have stated briefly the course of reasoning which has brought our minds to the conclusion above stated. We have not been able to find any authorities to aid us in our examination and have been forced to rely wholly on our owd judgment. It is, therefore, with much hesitation that we have formed this opinion, and we should not be surprised to find that others differed from us.

C. P. & B. R. Curtis.

Boston, June, 1837.

CASE OF THE SHIP MOLO.

The following items occur in a statement of salvage expenses, in the case of the ship Molo, stranded and totally lost, on the Island of Farro, and are charged by the insurance

broker to the account of the owners of the ship.

Lodging ship's company and pilot on Farro,	$13 00
Travelling expenses of Capt. and pilot from Elsinore, and ship's company of 18 men with their chests, &c. from Farro to Wisbuy,	90 08
Board and lodging of same at Wisbuy while waiting for a wind,	221 00
Paid for bringing them to Elsinore,	350 00
Rx.	674 08

The ship was abandoned to the underwriters.

It is understood, that the crew were employed in saving the materials of the vessel and cargo until the master ascertained that he could employ residents to better advantage. The authorities of the island required that the men should be removed therefrom, and it consequently became necessary to incur the above expenses, which were paid by the master, or by his authority.

The broker who prepared the statement demands reimbursement from the owners of the ship, the sum of 674 08 Rix dollars as above, and the question submitted to us is, whether they are bound to comply with the requisition.

OPINION.

The effect of an abandonment is to transfer the whole interest of the insured to the insurers, and to vest in them all the rights, privileges, and immunities possessed by the former, and to subject the latter to all the losses and damages occurring after the shipwreck, that the insured would have been subjected to, or liable for, had he not abandoned.

The connexion of the crew with the ship as mariners under their original contract had been dissolved by the shipwreck and abandonment. If they were bound to remain by the ship, it would be at the charge of the insurers who had become the owners, and not the insured, who, by their act of abandonment, had divested themselves of all right in, and control over, the property. The crew were entitled to wages up to the delivery of the cargo at the last port, freight having been earned, and from that period to the shipwreck, "or a compensation equivalent to their wages, by way of salvage in case they do their duty, and sufficient is saved from the wreck for that purpose." Story's Abbot, note to page 451. But by a provision in the Boston policies, the whole salvage belongs to the insurers, and although it may have been applied to the payment of wages, as such, or as salvage, for services rendered previous to the loss, the insured are bound to account for the same to the insurers. Yet if seamen are employed after shipwreck as salvors, they are entitled to remuneration for their services, not as mariners, but as laborers, and that too, from the insurers.

We do not think that, after an abandonment seasonably made and for good cause, the insured can be held answerable for any act of the master made in the exercise of a sound discretion, while he is acting exclusively as the agent for the insurers. A question like the one we are now considering may arise, as between the master and the insurers of the ship as to the application of any part or the whole of the proceeds of the wreck or for moneys taken up for such a purpose, but we do not see how such a question can be entertained, as between the parties to the insurance, the master acting solely in this case as the agent of the insurers, and having disbursed their money for the benefit of the crew, and not, as we think, for that of the insured.

The latter were under no obligation to get the crew home, or to provide means for that purpose at their expense. If the master has voluntarily advanced them money, or has by mistake overpaid them, it does not seem to us that it is competent for the insurers, to claim from the insured the reimbursement of a debt not created by them, or by any one acting under their authority, or having any lawful right, thus to involve them.

It would be difficult to cite a clearer case wherein such a question could arise. There is none as to the totality of the loss; the vessel was wholly insured; the whole of the salvage, therefore, belonged to the insurers; the abandonment was seasonably made, and the insurers have paid a total loss of the ship. The abandonment is retrospective. It takes effect at the instant of the loss, although not made until some time subsequent, provided, that at the time it was made, the total loss

continued. The interest in the subject thus abandoned, instantly becomes vested in the insurers precisely the same as though they had voluntarily purchased and paid for it. The refusal to accept an abandonment lawfully made will not exempt insurers from their liability. The abandonment when lawfully made, in effect constitutes the master the agent of the insurers, and he continues so until suspended by the special appointment of a substitute. While he is thus employed, they are bound by all his lawful acts. His authority to bind the insured by any act of his is terminated by the abandonment, in a case like this, where the whole interest is covered, and the loss is either actually or constructively a total one. See *Center v. American Insurance Company*, (7 Cowen, 564.) *Columbian Insurance Company, v. Ashley and Stribbing*, (4 Peters, S. C. R. 139.) 2 Phillips, 328.

ZEB. COOK, JR. & CO.

Boston, May, 1838.

AMERICAN CASES.

SUPREME JUDICIAL COURT.

BOSTON, JUNE, 1838.

William J. Loring v. the Neptune Insurance Company.

A general average adjustment made in the port of destination, fairly and according to the law of that place, is conclusive on all parties interested in the ship, cargo and freight.

By a law of the city of Hamburg, regulating general average losses, first published by the Senate in 1731, all goods contribute in general average according to the invoice with the charges till on board except the premium.

Each bill of lading is looked upon as a whole, and has to contribute according to the full invoice amount, without reference to any part being in a damaged state or totally destroyed.

It is only when the whole contents of a bill of lading, are destroyed, or so much damaged that the consignee refuses to receive them, that no contribution takes place.

All goods contribute according to the full invoice value provided they be received at all, and the receipt of any part of a bill of lading is tantamount to having received the whole.

THIS was an action on a policy of insurance, dated February 11, 1835, by which the defendants insured the plaintiff $7000, on property valued at that sum, on board the barque Stag, at and from port or ports of lading in Cuba to port or ports of discharge in Europe.

The vessel was owned by the plaintiff and J. A. Cunningham, and sailed March 5, 1835, with a cargo of 2125 boxes of sugar and 78 bags of coffee, from Matanzas for Hamburg. Three hundred and fifty boxes of sugar were the property of the plaintiff and were equal in value to the amount insured.

On the passage the barque sustained damage from the perils of the seas. Eightyeight boxes of sugar belonging to the plaintiff were totally destroyed and washed out. Fiftytwo boxes were damaged over 50 per cent. of their value. The residue of the plaintiff's invoice arrived at Hamburg in good order. The vessel having been compelled by the damages sustained to put into Bermudas for repairs, an adjustment of a general average contribution was made on her arrival at Hamburg, her port of destination; and the plaintiff was assessed on the invoice value of his sugar without any deduction or allowance made on account of that lost or damaged as above stated: and the amount so assessed was paid by his agent, the consignee of the cargo, according to said adjustment. This action was brought to recover the amount so paid. The defendants paid the plaintiff the value of the sugars which were totally lost and sixty per cent. of the value of the damaged parcel, but refused to pay the amount claimed in this action, on the ground that the adjustment at Hamburg was incorrect and ought to be revised.

The adjustment at Hamburg was made by John Olderman. From his deposition, it appeared that he was the despacheur of that port, and that the adjustment was made according to the laws of that place. It also appeared from the deposition of Doctor Gossler, an eminent lawyer practising in Hamburg, that the despacheur in Hamburg is elected by the government, and that, according to positive laws, no one else is there allowed to make up averages. That Olderman was formerly a merchant and afterwards studied law at the German Universities, and, on account of his being by experience and study versed in mercantile affairs, as well as in the laws governing their courts, he was thought particularly skilled in his present business, and that his integrity was beyond any doubt.

The question was submitted to the court whether, under the circumstances, the plaintiff could recover in the action, and it was agreed, that if the court were of opinion that he could, the defendant should be defaulted and the amount settled hereafter.

C. P. Curtis, for the defendants, argued that the assessment on the plaintiff for property which was *not saved* by the sacrifice, was against common justice, and that the clearest evidence ought to be produced that it was made pursuant to the law of the place; he contrasted the testimony of Dr Gossler, who had no interest in the case, with that of the despacheur who made up the adjustment, and the consignee who paid the money, and might be called upon torepay it, if the plaintiff did not recover it here. But admitting the general principle, that parties are bound by a general average adjustment, made at the port of destination, conformably to the established laws of that place, and admitting that this adjustment was so made, the learned counsel argued, that the law was founded in a mistake or disregard of the common principles of justice, and ought not to be recognized as binding in our courts. General average contribution was based on the principle of benefit received by the contributor from the jettison or expenditure or other sacrifice made for the common good, and that property which was *finally lost* never ought and did not contribute to the payment of general average, except that which was the subject of jettison or sacrifice;—that was paid for by the other contributary interests, and was itself brought into the adjustment as one of those interests. If it were not, it would be better for the owner to have his goods thrown overboard, in case of a storm, than to have them arrive in good safety. If this Hamburg regulation was to prevail, the condition of an owner who lost half his invoice by jettison would be far better than that of another owner who should lose an equal quantity by the storm. While the owner of the first was paid for his goods because they were sacrificed, the owner of the others would not only have no claim for payment for his, but would be held to contribute as owner of the very goods which he had lost, to the reimbursement of his fortunate co-shipper, whose goods happened to be more convenient to be thrown overboard.

C. G. and F. C. Loring for the plaintiff.

Shaw C. J. We are of opinion that the plaintiff is entitled to recover. By the testimony of Mr Olderman it appears that this adjustment was made in strict conformity to the laws of Hamburg. The law regulating general average losses in that place, was first published, it seems, by the Senate in 1731. By the twentyfirst article of that law, all goods contribute in general average according to the invoice, with the charges till on board, except the premium. Each bill of lading is looked upon as a whole, and if any part of it is received in a damaged or partly destroyed state, the whole bill of lading has to contribute according to the full invoice amount without reference to such damage or destruction. It is only when the whole contents of a bill of lading are destroyed or so much damaged, that the consignee refuses to receive them, that no contribution takes place; otherwise all goods contribute according to the full invoice value. All goods contribute according to the full invoice value provided they be received at all, and the receipt of any part of a bill of lading is tantamount to having received a whole bill of lading. It also appears, that the despacheur is a public officer, and his acts are in the nature of judicial proceedings. It is admitted on all hands, that Mr Olderman is a man of learning, of strict integrity, and possessing the confidence of all who know him. We are all of opinion, that this adjustment, made up under these circumstances, was fairly done and according to the laws of Hamburg. The rule there adopted is certainly a singular one, but we do not feel authorised to set it aside. It is difficult to see how the plaintiff could have helped paying what he did, and we think the adjustment is binding on both parties.

Judgment for the plaintiff.

Stephen M. Whitney et al v. Mary Goddard, Administratrix.

Where a contract was made in New York, and more than six years afterwards was sought to be enforced in this commonwealth, it was held, that the action was barred by the statute of limitations.

Asssumpsit on an account for goods sold and delivered the defendant's intestate, in the year 1829. The contract of sale was made in New York, and soon after a suit was com-

menced in the courts of that state, which was pending at the time of the testator's death in 1835, and thereby abated, but not until six years had elapsed from the time the contract was made. After the expiration of the six years, this action was commenced. At the trial before *Dewey J.*, at the November term, 1837, a nonsuit was ordered, subject to the opinion of the court, upon the question whether the plaintiffs were barred by the statute of limitations.

Brigham for the plaintiffs.

The contract sought to be enforced in this case, was made in the city of New York, and at the time, it was undoubtedly expected by both parties that it would be carried into effect there. But by the death of the defendant's intestate, the plaintiffs lost their remedy in the courts of New York, and within six years from the time they came within this commonwealth, but more than six years after the contract was made, they attempt to obtain a remedy here; and the only question is whether they are barred by our statute of limitations. Our statute of limitations was taken from the English act of 21 James I. chap. 16. sec. 7., and is the same in substance, and of course liable to the same construction. Whether the Revised Statutes have made any alteration in the act of 1786, chap. 52, it is unnecessary to discuss; for whatever rights the plaintiffs have, accrued while that act was in force, and are expressly reserved in the Revised Statutes, chap. 146, sect. 5. This case must therefore be determined by the construction of the statute of 1786, chap. 52.

It is admitted that the plaintiffs have lost their remedy unless they come within the exceptions in the fourth section of that statute, which provides that "it shall not bar any infant, feme covert, person imprisoned, or beyond sea, without any of the United States, or non compos mentis," until six years after such impediment shall be removed.

It has been settled in several cases, that this provision applies as well to foreigners and persons who have never been within the state, as to our own citizens, who have been absent. *White v. Bailey*, (3 Mass. R. 273.) *Hall v. Little*, (14 Mass. R. 203.) The plaintiffs contend that they were "beyond sea" till within six years before the commencement of this suit. It seems to be pretty clearly settled that foreigners come within the exception of the statute, and that they can bring and maintain an action at any time within six years after they come into the state, even though the cause of action accrued a greater number of years before. In *Strithorst v. Graeme*, (3 Wilson, 145,) it is said, "if the plaintiff is a foreigner and doth not come to England in fifty years, he has still six years after his coming to England to bring his action, and if he never come to England himself, he has always the right of action while he lives abroad, and so have his executors and administrators after his death."

The question then resolves itself into this. Does the exception extend to citizens of other states of the United States, on contracts made in those states, as well as to foreigners? All the reasons apply with as much force in one case as in the other. Both are beyond the jurisdiction of this state, and both, so far as relates to a remedy, are under a like disability. An inhabitant of Arkansas cannot obtain a remedy in our courts so easily as an inhabitant of Nova Scotia; and there does not appear to be any reason, either from national comity or public policy, why one should be exempt from the operation of the statute and not the other. If any difference was made, comity to our sister states would seem to give them a preference. There is in fact no difference. The whole object of statutes of limitation is to compel those who have a remedy to pursue it within a certain time. They were never intended to deprive any person of his rights who was under a disability, and who, by reason thereof, was guilty of no neglect. They were intended to be coextensive in their operation with the jurisdiction of the power that created them, and to extend no further. Foreigners are not supposed to know our laws, and a further extension of the statute of limitations would virtually exclude them from our courts, and afford a shield to our own citizens against their just claims. It would be a violation of those rules of comity, which we are bound to exercise towards foreign nations.

So far as relates to the statute of limitations, each of the other United States is a foreign nation to us. The jurisdiction of each of the states is limited to their own territory. A citizen of Missouri has no greater rights in our courts than a subject of the Queen of Great Britain. Both must come here to obtain them, and they will be grant-

ed here by the same reasons of comity in one case as in the other.

This question seems to be settled by our own court. *Pearsall et al. v. Dwight et al.* (2 Mass. R. 84,) is similar to the case at bar. In that case the defendants were inhabitants of Massachusetts, and the plaintiffs of New York; and the action was brought to recover a note made in New York. The defence was the same. The same principle was maintained in *Byrne v. Crowninshield*, (17 Mass. R. 55.) In *Bulger v. Roche*, (11 Pick. R. 36,) the facts are somewhat different, but the reasoning of the court sustains the same doctrine. The chief justice says, "this proviso in terms excludes the operation of the statute in all cases where the plaintiff is out of the commonwealth at the time the cause of action accrues."

In the other states and in the courts of the United States, the term "beyond seas" is considered the same thing as beyond the limits of the state. This is said to be the general construction in Angell on Limitations, 219. "In this country the rule seems to be, that beyond seas and out of the state are analagous expressions, and must have the same construction." In *Faw v. Roberdeau's Ex.*, (3 Cranch. 177.) Marshall, C. J. says, "beyond sea, and out of the state are analogous expressions, and are to have the same construction." In *Murrey v. Baker, et al.*, (3 Wheaton, 545,) it is said, "On this question the court are unanimously of opinion that to give a sensible construction to that act, the words 'beyond seas' must be held to be equivalent to 'without the limits of the state.'" In *Chomqua v. Mason;* (1 Gal. 346.) Story, J. says, "The proviso saves the action to all persons beyond the sea at the time when the action accrued. The statute does not begin to run against such person until his return. The true construction of the statute is, that the party shall have *six years after he comes into the state* to pursue his legal remedy. The case in Wilson is decisive, if so plain a position needed an authority to support it."

If this be the proper construction of the term "beyond seas," then the plaintiffs do not come within the operation of the statute, and the nonsuit should be taken off.

Hubbard and Watts for the defendant.

Shaw C. J. The question submitted to the court is, whether our statute of limitations applies to any inhabitant of this commonwealth, who is without the limits of the same, but who is within the limits of the United States. There have been many decisions respecting the statute of 1786, but none which seem to embrace the present case.—The act was undoubtedly copied from the English statute of limitations, and there can be no doubt that the term "beyond sea" means, in that country, beyond the jurisdiction of the court. The same ground has been taken in several of the United States; and if there were no qualification or controlling words in our statute, we should feel bound by principle and authority, to put the construction upon it that is set up by the plaintiff. We think that such a construction would be irresistible in order to give the statute any sensible effect. But we think that the legislature by inserting the words "without any of the United States," intended that the words "beyond sea" should have a wider signification than they have in the English statute, or in those of most of the other states, and that our statute of limitations was intended to extend to our citizens who might be resident in any other of the United States. It seems reasonable and proper that such should be the case. In many respects we are one people, speaking the same tongue, governed by similar laws, under the same constitution, and in the most intimate commercial relations. There does not seem to be any sufficient reason why the residents of other states should be included in an exception, intended to favor those who were under some real disability.

I do not think it necessary to review the several cases which have been referred to by the plaintiffs, because the language of our statute is essentially different from that upon the construction of which those cases were decided. There was one case referred to in the argument, however, which deserves some notice. It is the case of *Bulger v. Roche*, (11 Pick. R. 36.) The language there used certainly seems to conflict with the present decision. But upon careful examination, it will be seen that the point raised in this case was not necessary to be decided there, and was not intended to be; and if any thing in that opinion differs from the one now entertained, it was inadvertent; and I have not the

slightest recollection of having ever entertained a different opinion from the present, upon the subject under consideration.

Judgment on the verdict.

Eliza Bowen, Administratrix, v. The Hope Insurance Company.

Where a policy of insurance contained the clause, "if at sea. when the year expires, then the risk to continue till her arrival at port, at a *pro rata* premium," and the vessel, before the expiration of the policy, completed her loading at Bangor, Wales, and dropped down the bay, and came to, waiting for a wind to get out, but, after having made several efforts, was unable to do so until after the policy expired, it was held, that she was "at sea," within the meaning of the policy.

It would make no difference if the words in the policy ere "if on her passage," instead of "if at sea."

This was an action on a policy of insurance on the brig Governor Brooks. The policy was dated October 7, 1834, for one year, commencing on that day at noon, and ending October 7, 1835, at noon; and it contained the following proviso; "if at sea, when the year expires, then the risk to continue till her arrival at port, at a *pro rata* premium."

In September, 1835, the vessel was at Bangor, in Wales, loading for Boston; and, having completed her loading on or before the 23d, she "dropped down the bay, and came to, waiting for a wind to get out." On the 4th of October, at 8 A. M. she "got under way and tried to get out, and at 3 P. M. the tide turned, and she came to again." On the 5th, "at 10, A. M. got the anchor up and made all sail; at M. calm, came to, and furled all sails." On the 6th, "run out the kedge and warped off from the shore." On the 8th, "at 1, P. M. got under way with a pilot on board, and worked out of the harbor; and at 3, discharged the pilot and set all sail." In about thirtysix hours afterwards, they encountered a severe gale, which lasted three days, and caused great damage, so that they were compelled to put into Cowes for repairs. To recover for these repairs, this action was brought.

The defence was, that the brig was not under the protection of the policy, at the time of the disaster. At the trial before *Wilde J.* at the last November term, the only question submitted to the jury, was, whether the brig was in a harbor on the 7th of October, 1835, at noon. The jury found that she was not in a harbor.

The question as to the construction of the words "at sea," in the policy was reserved for the consideration of the court; the plaintiff's counsel contending, that the case was with them, even though the brig was not actually on the ocean; and the defendants' counsel contending that she was not "at sea," even if she were not, strictly speaking, in a harbor.

Lorings & Dehon for the plaintiff.

Parsons & Stearns for the defendants.

Shaw C. J. We do not think the question whether the brig was in the harbor of Bangor on the 7th of October, 1835, of much consequence in the present case. We think the law is well established that when a vessel is ready for sea, has quit her moorings, and is only waiting for an opportunity to proceed,— she is at sea, within the intent and meaning of a clause like the one in this policy.

Judgment on the verdict.

Eliza Bowen, Administratrix, v. The Merchants Insurance Company.

This was an action on a policy of insurance on the Governor Brooks, of the same tenor with the one above mentioned, with the exception, that the words, "if on her passage," were used, instead of the words, "if at sea." But the court held that this made no real difference in the cases, and decided this in the same way as the other.

Lorings & Dehon for the plaintiff.

Parsons & Stearns for the defendants.

David Miller v. John Baker.

It is essential to a mortgage of personal property that it should contain a defeasance.

It rests entirely within the discretion of the judge presiding at a trial, whether to report the evidence to the whole court or not. Counsel cannot claim it as a matter of right.

This was an action of trespass *de bonis asportatis*, brought against the defendant, sheriff of the county of Norfolk, for certain shrubs and green house plants, which he had attached as the property of one Senior. The plaintiff claimed the property by virtue of a

certain instrument which was regularly recorded in the office of the town clerk of Roxbury, but which differed from the usual form of mortgages of personal property, in that it contained no defeasance.

At the trial before *Wilde J.* the defendant contended that the instrument under which the plaintiff claimed the property, was an absolute bill of sale, and that, as such, it was void, because there was no delivery; but the judge ruled, for the purposes of the trial, that it was a mortgage; and a verdict was returned for the plaintiff. The defendant moved for a new trial, for alleged misdirections of the judge to the jury, and because the verdict was against evidence, and requested the judge to report the evidence to the whole court, which his honor refused to do.

S. D. Parker for the defendant, contended that the property in the articles attached was in Senior, at the time of the attachment. If the instrument under which the plaintiff claimed to own them was an absolute bill of sale, it was void as to creditors, because there was no actual consideration and no delivery. If the instrument was a mortgage, the plaintiff could not recover, because he had not taken the proper steps, pointed out in the Revised Statutes. But this instrument was not a mortgage. It was destitute of every essential quality of a mortgage. The plaintiff could not hold this property as mortgaged or as vended. Again, this action could not be maintained, because trespass would not lie against an officer, if the process be regular. He stood on different grounds from the plaintiff in the writ to be served.

D. A. Simmons for the plaintiff.

Shaw C. J., in delivering the opinion of the court remarked, that it was not necessary to consider all the positions taken by the plaintiff, because the court were satisfied that there ought to be a new trial for a single reason, namely, that the instrument, under which the plaintiff claimed this property, was held to be a mortgage, at the trial. The court were all satisfied that a defeasance was an essential part of a mortgage of personal property. Those conveyances were becoming very common; and it was important that the condition upon which mortgagees held mortgaged property, should be clearly and unequivocally expressed, for the benefit of other creditors. As the construction of this instrument as a mortgage must have affected the result at the trial, the court thought there ought to be a new trial.

In the motion for a new trial it was said, that the verdict was against evidence, and the defendant claimed, as a matter of right, that the presiding judge should report the evidence to the whole court. This question was of considerable practical importance, and the court had given it much attention. They were clearly of opinion, that the presiding judge had a right to refuse to report the evidence, wherever he was of opinion that justice did not require it. There were often many circumstances entering into the proceedings at trials, which had great effect upon the result, but which could not be reported,—and when the presiding judge was satisfied, that, all things considered, the verdict ought to stand, or that there was nothing in the evidence that required further consideration, it rested entirely in his discretion, whether to report the evidence or not.

But the practical consequences of the doctrine set up by the defendant would be highly injurious. If, in every trial, the losing party could claim, as a matter of right, that the whole evidence should be reported to the court, it was easy to see, that litigation and delay of the final disposition of causes would be increased to an alarming extent. Formerly, new trials were very seldom granted for the reason that the verdict was against evidence. The practice had increased somewhat, of late years, in this country, although in England it was not so common. Indeed, the practice of referring cases to the court upon the evidence, after a jury had passed upon them, had become much too frequent. Counsel were exceedingly apt to enter into the feelings of their clients, and to wish to carry causes as far as possible whenever they were unsuccessful. There should be some check, and it could be reposed no where more properly than with the judge presiding at the trial.

Verdict set aside and a new trial granted.

James Riddle v *Benjamin F. Varnum.*

When certain timber was sold, and the purchaser paid a part of the consideration, and it was agreed that the quantum should be afterwards ascertained, it was held, that, under the circumstances, the property in the timber passed to the vendee.

This was an action of trover for a quantity

of plank, brought against the defendant, the sheriff of Middlesex, who, by his deputy, one Coburn, had attached the same as the property of Curtis & Barstow, in January, 1835.

It appeared in evidence at the trial before *Wilde J.*, at the last November term, that the plaintiff sent the property, which is in dispute, from New Hampshire, by the Middlesex canal, to Charlestown. While it was lying in the pond at the termination of the canal, he agreed to sell it to Curtis & Barstow.—They paid him $200 in hand, and writings were interchanged between the parties. It was agreed that Curtis & Barstow might procure the timber to be measured, and the plaintiff was to agree to the measurement.

After this property was attached as above, the plaintiff gave Curtis & Barstow his note for $200, and the writings that had passed between the parties were cancelled. Evidence was introduced by the defendant to show that when lumber was purchased lying in the pond, it was always considered the purchaser's, and delivered, without any other act.

Upon this evidence the defendant maintained that the delivery as well as the sale of this plank by the plaintiff to Curtis & Barstow, was understood and agreed by them to be complete, leaving the latter to ascertain the quantum of the property by some competent person, and desired that the case might go to the jury upon these points. But as the plaintiff consented that if a verdict for the defendant could by law be sustained by the Court, judgment might be entered for the defendant, the case was taken from the jury and submitted to the Court upon the evidence.

Sewall for the plaintiff.

Bartlett for the defendant.

Dewey J. Whenever at the time of an agreement to sell, some condition precedent is to be performed by either party, the property does not pass until that condition is complied with. But in this case, there appears to have been merely an agreement that the amount of the property should be afterwards ascertained. This has no other effect than to ascertain how much was to be paid. We think the fact that a part of the consideration was paid, connected with the other circumstances of the case, affords sufficient grounds on which to found the presumption that there was a delivery of this property, and that the jury would have been authorised by law to return a verdict for the defendant.

Judgment for the defendant.

George Law et al. v. Edward Thorndike, Administrator.

This court has no jurisdiction, as a court of chancery, where the complainant has an adequate remedy at law.

THIS was a bill in equity to rectify a mistake said to have been committed by the commissioners under the French treaty. It set forth that one Larkin T. Lee and one Henry Thorndike were the joint owners of the schooner Two Friends, which was captured by the French in 1809—said Lee being owner of one third of the schooner, freight and cargo, and said Thorndike being the owner of two thirds. That, by virtue of the late treaty with France, an indemnity was obtained for said loss, which, by a clerical mistake of the commissioners, who were appointed by act of Congress to determine the claims of parties thereto, was awarded to said Thorndike, and that certificates therefor had been issued to him by the treasurer of the United States, when one third of the same rightfully belonged to the plaintiffs. This indemnity was payable in six instalments—some of which were not due at the time this bill was filed.

The defendant demurred to the bill, on the ground that the court, as a court of chancery, had no jurisdiction over the subject matter.

Shaw C. J. The court are all of opinion that this bill cannot be sustained, because the plaintiffs, by their own showing, have a plain and adequate remedy at law, by an action of assumpsit for money had and received. We give no opinion of the probability of their succeeding in such an action, because it is not necessary or proper in the present case. But from the facts disclosed in the plaintiff's bill, they can receive no assistance from this court, as a court of chancery.

Bill dismissed.

SUPREME JUDICIAL COURT.

BANGOR, JUNE TERM, 1838.

The case of Waldo T. Peirce.

Justices of the peace have no power to compel a person to give his deposition *in perpetuam*.

THIS was a writ of *habeas corpus* directed

to the gaoler of this county, commanding him to bring before the court the body of Waldo T. Peirce. The cause of his detaining said Peirce was set forth in a copy of the warrant, by virtue of which he was imprisoned, which copy was made a part of the gaoler's certificate. The warrant was issued by Jonathan P. Rogers and Frederick H. Allen, two justices of the peace and the quorum for this county, reciting that said Peirce, having been summoned before them at the request of one Fiske to give his deposition in perpetuam, in relation to a bond for the conveyance of real estate in Bangor—and having refused to comply with the summons, a *capias* was issued, and he was brought before said justices, and that, being brought before them, he refused to depose and testify in relation to said bond, or to make answers to such questions as might be propounded to him by said Fiske, under direction of said justices; being a matter in relation to which the deposition of said Peirce was by law authorised. The gaoler was therefore commanded to receive said Peirce and him detain, &c.

The justices claimed to exercise the right of issuing said warrant by virtue of an act of this State passed March 15, 1821, "prescribing the mode of taking depositions," and "an act additional" thereto, passed March 4, 1833.

The first section of the first mentioned statute provides that "when any civil cause shall be pending in any court or before any justice of the peace in this state, and the writ, original summons or complaint shall have been served on the defendant, and either party shall think it necessary to have the testimony therein of any person who shall live more than thirty miles from the place of trial," &c. "then the deposition of such person may be taken before any justice of the peace," &c.

The eighth section provides that "when any deposition shall be taken in perpetual remembrance of a thing, it shall be done by two justices of the peace, quorum unus." &c.

The additional act provides that "whenever any justice of the peace and of the quorum in any county shall have issued his citation to any person, notifying such person to appear before him to give his deposition in any affair in which depositions are by law authorised to be taken, and said citation shall have been duly served," &c. "and said deponent shall refuse or neglect to appear" &c. "said justice may issue his capias, directing the officer to apprehend said deponent, and bring him before said justice," &c.

The second section provides that "whenever any deponent shall appear before any justice of the peace and of the quorum, in obedience to any citation duly issued and served, requiring such deponent to appear as aforesaid, and give his deposition in any matter in which depositions are by law authorised to be taken, or whenever any such deponent shall be brought before said justice upon any capias issued as aforesaid, if said deponent shall refuse to depose and testify, or to make answer to such questions as may be propounded to him by either party under the direction of said justice the said justice is hereby vested with the same power to compel said deponent to depose, testify, and answer as is now vested in the judicial courts and in justices of the peace for compelling witnesses on the stand, in the trial of causes in open count, to testify what they know relative to the issue on trial."

The principal question arising in the case was whether the power vested in the justice, in the second section of the additional act, was intended to be granted to the justices of the peace, quorum unus, for the taking of depositions in perpetuam, or whether it was intended to apply, only to the cases embraced in the first section of the act of 1821.

Appleton and Hill, for Peirce, contended for the latter construction, and insisted that no compulsory process was intended to be granted for the taking of depositions in perpetuam;—that the power was granted to a single justice,—and not to two justices of the peace quorum unus, who alone are constituted a legal tribunal for the taking of depositions in perpetuam, and that the statute intended to embrace those cases only where the matter was a matter in litigation. A contrary doctrine would expose a man to be harassed continually by any individuals who were disposed to intermeddle in his private business or affairs.

T. McGaw and Mellen, for Fiske, contended for the right of justices to exercise the power in question; that the language of the statute "in any affair," and "in any matter," clearly embraced the case at bar;—

that the power granted to a single justice might be equally well exercised by two,—and that the maintainance of justice equally required the exercise of the power in question in the case of depositions in perpetuam, as in those taken in pursuance of the first section of the original act.

Per curiam.—The liberty of the citizen being involved, the court will construe the statute strictly, and will not extend the law to embrace any doubtful case. No authority being given by any statute of this state to a single justice of the peace and of the quorum, to take depositions in perpetuam, and the right of imprisoning being confirmed by the statute in question to such a magistrate, the court are of opinion that the imprisonment in this case was illegal and unauthorised.

Prisoner discharged.

COURT OF CHANCERY.

NEW YORK, MAY, 1838.

Horace Butler et al. v. Simeon Stoddard et als.

A sale of goods will be deemed fraudulent as against creditors, unless accompanied by an actual and continued change of possession.

B. and L. creditors of S., commenced a suit at law for the recovery of their debt. Before they obtained execution, S. made an absolute assignment of his property to T. and T. in consideration of certain debts due them. After the execution of this instrument, S. was left in possession of the store of goods, and of the notes and accounts, to sell the goods and collect the debts for the sole benefit of T. and T., they paying him a reasonable compensation for his services. B. and L., after obtaining execution, filed a bill to reach the property of S. and to set aside the assignment as fraudulent. It was held, that the assignment was fraudulent and void as against the complainants.

But T. & T. were allowed to retain, in part payment of their debt, the moneys received by them, before the filing of the complainants' bill, for debts collected before that time, or for goods sold before the complainants obtained a lien thereon by the issuing of their execution.

THIS was an appeal from a decree of the vice chancellor of the fifth circuit, dismissing the complainants' bill. The complainants were judgment creditors of the defendant Stoddard, and their execution against him had been returned unsatisfied. The bill was filed to reach his property and choses in action, and to set aside an assignment thereof to the defendants Thurber and Townsend as fraudulent. While the complainants were proceeding in their suit at law against Stoddard for the recovery of their debt, he made an absolute assignment of his store of goods, inventoried at cost prices at about $436; and of all his debts and choses in action, of the nominal amount of $1209; of which debts, according to the testimony of the witnesses, about $875 were good and collectable. The consideration of this assignment, which was absolute on its face, was a debt due from Stoddard to the purchasers for about $700. And Stoddard, after the execution of the bill of sale, was left in the possession of the store of goods, and of the notes and accounts, to sell the goods and collect in the debts for the sole benefit of Thurber and Townsend; they paying him a reasonable compensation out of the same for his services.

Matteson and Beardsley for the complainants.

Stevens for the defendants.

The Chancellor.—Upon a careful examination of the answers of the defendants and the evidence in this case, I think the conclusion of the vice chancellor that the assignment of Stoddard's property was not fraudulent, was erroneous. Independent of the legal presumption of fraud, arising from his continuance in possession after the execution of the absolute bill of sale, I think the amount of property assigned, was, at its fair value, much more than sufficient to pay the debt due to the purchasers. The case would have been somewhat different if Townsend and Thurber had taken the property in absolute satisfaction of their debt, and at their own risk; or if they had taken an assignment of the property in trust for the other creditors, after securing to themselves a preference in payment out of the same. But as I understand the transaction, the bill of sale to them was absolute, so as to give them the full benefit of all the property and debts assigned, if the amount realized therefrom should be more than the amount of their debts, but to be applied to the extinguishment of their debt *pro tanto* only, if the proceeds of the assignment should, for any reason, turn out to be less. As the nominal amount of the goods and debts assigned was more than double what was actually due to Thurber and Townsend, I can see no reason for the making of an absolute sale and assignment of all this property to

them, without any risk of loss on their part, unless it was upon some secret or implied understanding between the parties to that transaction, to keep the surplus from other creditors, and for the benefit of Stoddard.

Besides, there never was in fact any change of possession of the assigned property, until after the issuing of the complainants' execution; as the nominal appointment of the seller as the agent of the buyers, to retain the possession and retail the goods and collect in the debts for them, without any visible change in the mode of doing business at the store, was not a change of possession, within the intent and meaning of the statute on this subject. The sale must be accompanied by an actual and continued change of possession, as well as a nominal and constructive change, or the transaction will be deemed fraudulent, as against creditors. And a construction which would allow the vendor or assignor of a store of goods, to continue in possession thereof, and to retail them out as the agent of the purchaser or assignor, would render this statutory provision for the prevention and detection of frauds, a mere nullity.

For these reasons the decree of the vice chancellor must be reversed with costs; and a decree must be entered declaring the assignment from Stoddard to Thurber and Townsend fraudulent and void as against the complainants. But as the complainants had no lien on the goods as against other creditors, until the issuing of the execution, or upon the debts and choses in action of Stoddard until the filing of the bill in this cause, the moneys received by Thurber and Townsend before the filing of the bill, for debts collected before that time, or for goods sold before the complainants obtained a lien thereon, by the issuing of their execution, the defendants, Thurber and Townsend have a right to retain in part payment of their debt. But they must account to the complainants for the value of the goods on hand at the time of issuing the execution; as the complainants, by reason of this fraudulent assignment, were prevented from reaching those goods by their execution. The complainants are also entitled to all the debts and choses in action which had not been collected and actually paid over to Thurber and Townsend at the time of the commencement of this suit. The defendants must therefore account for any moneys received by them, either from Stoddard or any other person, since that time on account of such debts, or which may have been received by Stoddard as their agent. It must therefore be referred to a master to take an account accordingly, allowing interest as shall be just. The master is also to appoint a receiver, to whom the defendants are to assign and deliver over on oath, under the direction of the master, the notes, book accounts and other demands remaining uncollected, with the usual powers to such receiver. The master is also to take an account of what is due to the complainants for principal and interest on their judgment. And the question of costs and all other questions and directions are reserved until the coming in and confirmation of the report.

MUNICIPAL COURT.

BOSTON, MARCH TERM, 1838.

The Commonwealth v. Nelson H. Canfield.

Where the jury return facts irrelative and impertinent to the issue, or partial and incomplete, not covering the whole ground; or if the point in issue cannot be concluded from their finding, the court will set aside the verdict and grant a new trial.

Thacher J. Nelson H. Canfield was tried at the last term for forgery, which is, by the law of this Commonwealth, a misdemeanor. The indictment contained two counts. The first was for forging an acquittance and discharge for money, which was of the following tenor:—"Boston, August 1, 1837. Received of Mr Canfield 100 dollars in full for rent for one year from date. L. Goodridge," with intent to defraud one Lowell Goodridge.

The second count described the offence more specially. After reciting that Nelson H. Canfield, on 1st August, 1837, paid to Lowell Goodridge the sum of ten dollars, for rent due to him, and that said Goodridge subscribed and delivered to said Canfield a genuine acquittance and discharge for that sum, which was of the following tenor: "Boston, August 1, 1837. Received of Mr Canfield 10 dollars in full for rent. L. Goodridge:" the indictment proceeds to charge, that said Canfield fraudulently altered and forged the same by inserting an additional cypher on the right hand side of the figures 10, making it to appear 100, and also by adding and writing after the word "rent," the words "for one year from date;" and thereby fraudulently made the said genuine re-

ceipt for ten dollars to be altered and become a forged receipt for one hundred dollars, (as set forth in the first count) with intent to defraud said Lowell Goodridge.

After a laborious trial, the jury returned a verdict in the following words: The jury find the defendant guilty of fraudulently obtaining from L. Goodridge a receipt for one hundred dollars, for which he only paid ten dollars; and that since the said receipt was signed by L. Goodridge, the words "from date," have been added to the same.

The attorney for the commonwealth moved for, and Mr Sprague, the counsel for the defendant, objected to the acceptance of this verdict; and, as the court cannot with propriety refuse a verdict, if it be pertinent to the matter in issue, it was ordered to be recorded without prejudice to the rights of either party.

Afterwards, by consent of the parties, and before the argument, this special verdict was amended so as to read as follows:

"The jury find the defendant guilty of fraudulently obtaining from Lowell Goodridge, a receipt for one hundred dollars, for which he only paid ten dollars, and that, since the said receipt was signed by said L. Goodridge, the words "from date" have been added to the same. And the jury submit to the court whether these facts constitute a crime in law, and if they do, then the jury find the said Canfield guilty—otherwise the jury find that he is not guilty."

In a special verdict, the jury are not to find evidence, but facts, on which the court must decide. But nothing is to be intended against the accused party, which is not expressed or necessarily implied by the verdict.

The facts of this special verdict would not authorise the jury to find, nor the court to infer, that the defendant was guilty of either count of the indictment. For Canfield may have obtained the receipt fraudulently from Lowell Goodridge, and the words "from date" may have afterwards been added; and yet, if these words were not added by Canfield with an intent to defraud Lowell Goodridge, or if they were not material, it would not be forgery, nor could the court proceed to pass sentence.

The language of the special verdict is extremely loose and indefinite. It says, "that the defendant is guilty of fraudulently obtaining from L. Goodridge a receipt for one hundred dollars," without saying whose receipt it was, or to whom it was given, or that it was the same which is described in the indictment. It also says, "that since the said receipt was signed by L. Goodridge, the words, "from date" have been added to the same," but not by whom this addition was made, or with what intent.

To obtain such a receipt fraudulently from another, would be an indictable offence. But in this case, that offence is not charged, nor was Canfield on trial for it. If it had been charged, the indictment ought to have set forth the means by which the fraud was effected, by false tokens or by false pretences; that the defendant, being informed of the accusation, might have prepared himself for the trial. The subsequent alteration of the receipt, allowing that it is material, without finding also that it was inserted by the defendant, and with the intent to defraud Goodridge, would not authorise the inference, that he was guilty of the crime charged. Therefore, the defendant cannot be recorded guilty under this indictment, and no sentence can be pronounced against him by force of the special verdict.

Seeing that this verdict cannot operate to convict the defendant under the indictment, what is its legal effect? Although the jury have found, that the defendant was guilty of something which was not charged, and for which he was not on trial; I cannot consider that his consent will authorise a sentence for any offence which is not described in the indictment.

The defendant cannot be tried twice for the same offence; and unless he confesses his guilt by the plea of guilty, or there is a verdict on the whole matter, the trial is incomplete, and there can be no sentence as on a conviction. But we cannot deny to the commonwealth, the party injured, one fair trial of the accused, nor one final verdict in every case. If the jury return facts irrelative and impertinent to the issue, or partial and incomplete, not covering the whole ground; or if the point in issue cannot be concluded from their finding; the verdict must be set aside, and cannot be the ground of a judgment. From the best consideration which I have been able to bestow on this verdict, it appears to be both uncertain and insufficient: and as it cannot be amend-

ed, nor its defects supplied, it is the opinion of the court, that it must be set aside, and that a new trial be ordered.

DIGEST OF ENGLISH CASES.

[Selections from 5 Adolphus & Ellis, Parts 2 & 3; 1 Nevile & Perry, Part 5, and 2 Nevile & Perry, Part 1; 3 Bingham, Part 5; 4 Scott, Parts 2, 3, and 4; 2 Meeson & Welsby, Parts 5 and 6, and 3 Meeson & Welsby, Part 1; and Dowling's Practice Cases, Vol 5, Part 5, and Vol. 6, Part 1.]

ACTION ON THE CASE.

(For negligent driving.) A. borrowed of B. a horse and chaise and went in it, accompanied by C., on an excursion of pleasure, C. driving. By C.'s mismanagement, the horse and chaise were driven against and injured the plaintiff's horse: Held, that an action on the case might be maintained against A. for the injury, on a count stating that he was *possessed of and driving* the horse and chaise, and that by *his* negligent driving the injury was occasioned. *Wheatly v. Patrick*, 2 M. & W. 650.

ARBITRATION.

1. *(Certainty of award.)* In a dispute on a building contract, arbitrators were to award on certain alleged defects in the building, on claims for extra work, and on deductions for omissions; and to ascertain what balance, if any, might be due to the builder. An award, ordering a gross sum to be paid to the builder, without any decision on the alleged defects, was held bad. *In the matter of Rider*, 3 Bing. N. C. 874.

2. *(Costs—Excess of authority by arbitrator.)* If by the submission, the costs of a reference are to abide the event, it is an excess of jurisdiction for the arbitrator to determine the amount. *Kendrick v. Davies*, 5 D. P. C. 693.

ARREST.

(Privilege from.) A party to a reference, who, after the adjournment of the hearing of it to a subsequent day, does not, within a reasonable time, return home, for want of pecuniary means, is not privileged from arrest during the period of adjournment. (The adjournment was from the 7th of January to the 15th of February, and the opposite party had given notice that they would not proceed with the reference, but would apply to the court in Hilary Term to set it aside. The defendant remained in London till the 16th January. This was held an unreasonable time.) *Spencer v. Newton*, 1 N. & P. 818.

BILL OF LADING.

(Conclusiveness of — Privity between consignee of bill of lading and ship-owner.) In an action by the consignee of a bill of lading against ship-owners, for not delivering the cargo, it appeared that one of the defendants was the consignor, and was also the general agent of the plaintiff: Held, that the defendants were not estopped by the bill of lading given by the master of the ship, and acknowledging a cargo on board, from showing that no cargo was actually shipped. (1 B. & Ald. 712; 1 Moo. & Rob. 106; 3 B. & C. 421; 2 T. R. 63.)

Quære, whether there is any privity between the consignee of a bill of lading and the ship-owner, so as to enable the former to sue, as shipper, in case the goods mentioned in the bill should not be delivered. (1 T. R. 659) *Berkley v. Whatling*, 2 N. & P. 178.

BILLS AND NOTES.

1. *(Right of indorsee v. indorser of note.)* The indorser of a *promissory note* does not stand in the situation of maker relatively to his indorsee. Therefore, the indorsee cannot declare against the indorser as maker, even though he has indorsed a note not payable or indorsed to him, and where, consequently, his indorsee cannot sue the original maker. (1 C. M. &. R. 439; 2 Bing. N. C. 249.) *Gwinell v. Herbert*, 5 Ad. & E. 436.

2. *(Pleading—Debt against acceptor.)* Debt does not lie by the indorsee against the acceptor of a bill of exchange.

A count, stating that the defendant accepted a bill, and promised to pay the amount, whereby an action had accrued to plaintiff to demand the amount, was held an informal count in debt. *Cloves v. Williams*, 3 Bing N. C. 868.

3. *(Notice of dishonor.)* The drawer of a bill, being asked if he was aware that the bill had been dishonored, answered, "Yes; I have had a very civil letter from Mr. G. (an intermediate indorsee) on the subject; and I

will call and arrange it :" Held, in an action against the drawer, that this admission relieved the plaintiff from the necessity of proving a regular notice of dishonor. *Norris v. Salomonson*, 4 Scott, 257.

DEATH, PRESUMPTION OF.

When a party has been absent seven years without having been heard of, the presumption of law then arises that he is dead; but there is no legal presumption as to the *time* of his death. *Nepean v. Doe* d. *Knight*, 2 M. & W. 894.

DEVISE.

Testator, by his will, directed that his debts, &c. should be paid out of the rents and profits arising from his estate; after which he gave and bequeathed to A. the rents and profits of his estate, keeping the whole of the premises in repair, during his life; and after A.'s death, he bequeathed unto his three nieces "all that freehold or leased premises now rented," &c. "situated &c." "to hold to and for their own use and purposes, equal, share and share alike." He then gave and bequeathed some other freehold and leasehold premises, and some plate, &c.; and he left the rest and remainder of his property, be it what it might, to A.: Held, that a niece took a life estate only under the will. (11 East, 220.) *Doe* d. *Viner v. Eve*. 5 Ad. & E. 317.

EVIDENCE.

(Comparison of handwriting.) The defendant in ejectment produced a will, and on one day of the trial (which lasted several days) called an attesting witness, who swore that the attestation was his. On his cross-examination, two signatures to depositions respecting the same will in an ecclesiastical court, and several other signatures, were shown to him, (none of them being in evidence for any other purpose in the cause,) and he stated that he believed them to be his. On the following day, the plaintiff tendered a witness to prove the attestation not to be genuine. That witness was an inspector at the Bank of England, and had no knowledge of the handwriting of the alleged attesting witness, except from having, previously to the trial, and again between the two days, examined the signatures admitted by the attesting witness, which admission he had heard made in court. Lord Denman, C. J., and Williams, J., were of opinion that such evidence was receivable; Patteson and Coleridge, Js., that it was not. *Doe* d. *Mudd v. Suckermore*, 5 Ad. & E. 703; 2 Nev. & P. 16.

FRAUDS, STATUTE OF.

(Undertaking to answer for debt of another.) The plaintiff having issued execution against L. for debt, L. with the plaintiff's assent, conveyed all his property to the defendant, who thereupon undertook to pay the plaintiff the debt due from L., the plaintiff withdrawing the execution: Held, that the defendant's undertaking was not an undertaking to pay the debt of a third person, within the meaning of the statute of frauds. (1 Wils. 305) *Bird v. Gammon*, 3 Bing, N. C. 883.

FREIGHT.

Where a ship is chartered to bring home a cargo of enumerated articles, at rates of freight specified for each; which articles are not provided by the charterer, the freight must be paid upon average quantities of all the articles, whether the ship return empty, or laden with a cargo of articles different from those enumerated. (2 Stark. N. P. C. 450.) *Caper v. Forster* 2 Bing. N. C. 938.

HUSBAND AND WIFE.

(*Liability of wife to execution.*) An action was commenced against a defendant whilst she was a feme sole; but after service of the writ, and before declaration, she married. The plaintiff proceeded to final judgment, and took her in execution. On motion to discharge her out of custody, the affidavit stated the above facts, and also that no settlement was made upon the marriage; but it did not state that she had no separate property: Held, that the affidavit was insufficient, and that she was not entitled to be discharged. *Evans v. Chester*, 2 M. & W. 847; 6 D. P. C. 140.

INNKEEPER.

(*Liability of.*) An innkeeper is not liable in *trover* for the loss of articles deposited in his house for the purpose of being forwarded by a carrier. *Williams v. Jesse*, 3 Bing. N. C. 849.

INSURANCE.

1. (*By fire.—Breach of warranty against working cotton mill by night.*) In a policy of insurance against fire on cotton mills, there was a warranty that the mills were brick built, and warmed and worked by steam, lighted by gas, and *worked by day only:* Held, that this stipulation meant only that the usual cotton manufacture carried on by the mills in the day-time, should not be carried on in the night; and that it was no breach of the warranty, that, on one occasion, in order to turn machinery in an adjacent building, the steam-engine, (which was not in the mill, but in an adjoining building,) and certain perpendicular and horizontal shafts in the mill, (which were averred in a plea to be "respectively parts of the said mill,") were at work by night. (See *Whitehead v. Price*, 2 C. M. & R. 447, a case which arose on another policy on the same mills.) *Mayall v. Milford*, 1 N. & P. 732.

2. (*Deviation — Unreasonable detention.*) Assumpsit on a policy of insurance on the goods of a vessel called the Clipper, at and from Liverpool to any port or ports, place or places of loading and trade on the coast of Africa and African islands, during her stay and trade on the said coast and islands, and at and from thence to her port or ports of discharging in the United Kingdom, with leave to call at all ports and places backwards and forwards, and forwards and backwards, *without being deemed any deviation;* with liberty for the said ship in that voyage to proceed and sail to and stay at any ports or places whatsoever, and with leave to load, unload, &c., goods wheresoever she might proceed to, with any ships, boats, &c. in loading and unloading included, *particularly with liberty to tranship* on board any vessel or craft in the same employ; with an agreement that the vessel might be employed or used as a *tender* to any other vessel or ship in the same employ. The vessel arrived at Benin, in Africa, and stayed there thirteen months, during which time she was employed in conveying goods from a vessel in the same employ at the mouth of the river, to Camaroones, and putting them on board another vessel, also in the same employ; but on her return with a homeward cargo, was lost: Held, that the learned judge who tried the cause was right in telling the jury that the voyage to the Camaroones was a deviation, and that it was not an acting as a tender within the meaning of the policy: Held, also, that it was a proper question for the jury, whether her stay at Benin was unreasonable or no; and they having found in the affirmative, it was warranted by the evidence.—*Hamilton v. Sheddon*, 3 M. & W. 49.

INTEREST.

Where goods are sold and delivered, to be paid for by a bill at a certain date, if the bill be not given, interest on the price, from the time when the bill would have become due, may be recovered as part of the estimated value of the goods, on the common count for goods sold and delivered. (13 East, 98.) *Farr v. Ward*, 3 M. & W. 25.

LEASE.

1. (*Forfeiture for non-repair — Waiver.*) A lease of lands, &c. by A. to B. contained a general covenant by B. to repair, and a further covenant that A. might give notice to B. of all defects and want of repair; and if B. did not repair such defects within two months, A. might enter and do the repairs himself, the expense of which B. was to repay at the time of payment of his next rent, and if he did not do so, A. might distrain on him for the expense, as in case of rent arrear. The premises being out of repair, A. gave B. notice to repair within six months, and that if he did not repair within that time, he, A., would do the repairs, and charge B. with the expense. The premises were not repaired within the six months: during that time a negociation was entered into between A. and B., and after the expiration of the six months, A. gave notice to B. that if he did not agree to certain terms in three days, he would hold him to the covenants in his lease. B. did not agree: Held, that A. could not recover in ejectment for a forfeiture, he having elected to perform the repairs and distrain on B. for the expense, and the general power of re-entry not being revived by the three days' notice. (4 B. & C. 606; 4 B. & Ad. 84.)

Semble, that where a power of re-entry for breach of covenants is reserved in a lease, and the reversion descends to co-parceners at common law, one alone cannot maintain ejectment for breach of the covenant. (1 Salk. 390; 4 Rep. 120, 126; Vin. Abr. Apportionment, A. 28.) *Doe d. Rutzen v. Lewis*, 5 Ad. & E. 277.

2. (*Entry and expulsion by lessor, what is.*) Where the plaintiff declared on a covenant in a lease by the defendant, that the plaintiff should have, occupy and enjoy the demised premises from a day named, for a certain term, and alleged as a breach that the plaintiff, on the day named, entered upon the demised premises, and became possessed of them for the term, but that he was not able to occupy and enjoy the premises in this, to wit, that, the plaintiff being so possessed, the defendant entered into the premises, and upon the plaintiff's possession, and expelled and kept him out: Held, that such breach was not proved by evidence that the plaintiff came to take possession, but was refused entrance by the defendant, who continued in occupation of the premises, and never admitted him. *Hawkes v. Orton*, 5 Ad. & E. 367.

3. (*Covenant to repair, action on.*) In an action on a covenant to keep premises in repair during the tenancy, the jury may take into consideration the state of repair at the commencement of the demise, in order to assess the damages for which the defendant is liable. (7 C. & P. 129; 3 Bing. N. C. 4.) *Burdett v. Withers*, 2 N. & P. 122.

4. (*Surrender.*) A. having granted a lease to B. for twentyone years, before the expiration of that term, granted another lease of the same premises to C. No surrender in writing of B.'s interest was shown, but the lease granted to him was produced from A.'s custody, with the seals torn off; and it was proved to be the custom to send in the old leases to A.'s office, before a renewal was made; and which old leases were thereupon cancelled by A.'s officer: Held, that this was evidence from which the jury might presume that B. had assented to the grant of the lease to C., so as to determine his interest by act and operation of law. *Walker v. Richardson*, 2 M. & W. 882.

LIBEL.

(*Publication of proceedings in courts of justice.*) A publication of proceedings in a court of justice cannot be justified if it contain disparaging observations on the plaintiff, made by any other than a judge of the court. (5 Bingh. 405.)

And it is no justification of such publication, to plead that the proceeding took place, unless it be also alleged that the charges were true, or that the publication is a true and accurate account of the proceedings. *Delegal v. Highley*, 3 Bing. N. C. 950.

LIMITATIONS, STATUTE OF.

1. The following letter was held a sufficient acknowledgment to revive a debt barred by the statute: "I wish to comply with your request, for I am very wretched on account of your account not being paid: there is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account; if it does not, the concern must be broken up to meet it; my hope is, that out of the present harvest you will be paid." And the amount of the debt may be proved by extrinsic evidence. (1 C. & M. 623.)—*Bird v. Gammon*, 3 Bing. N. C. 183.

2. (*When it begins to run—Part payment.*) The defendant was indebted to the plaintiffs in a balance of 2,245*l.*, for which they held his over-due promissory note. In 1827, the plaintiffs and defendant agreed that the defendant should pay the balance as follows: 245*l.* in cash, and the remainder by annual payments of 300*l.* a year out of his salary as a consul abroad, and by the proceeds of certain wines consigned by him to India; and that the plaintiffs should hold his promissory note as a security for the payment of the account. The 245*l.* was paid, and the 300*l.* was also duly paid in 1828 and 1829, but the defendant made default in payment of it in September, 1830: Held, that the plaintiffs were entitled, at any time within six years from September, 1830, to sue the defendant on the promissory note, or for the balance remaining due, on a count upon an account stated. (16 East, 420; 2 M. & W. 443; 1 H. Bl. 631; 6 B. & C. 603; 7 Bing. 163.)

Where a debtor draws a bill of exchange, to be applied in part payment of the debt, and the bill is paid when due by the drawee to the creditor, it operates as part payment, to defeat the statute of limitations, only from the time of the delivery of the bill by the debtor, not from the time of its payment. (3 B. & Ad. 507.) *Irving v. Veitch*, 3 M. & W. 90.

MASTER AND SERVANT.

(*Determination of yearly hiring.*) A contract to serve, as reporter to a newspaper, for one whole year from a certain day, and so from year to year to the end of each year commenced, so long as the parties should respectively please: Held to be a yearly ser-

vice so long as it lasted, and not determinable except at the end of any current year. (4 Bing. 309; 5 B. & Ad. 904.) *Williams v. Byrne*, 2 N. & P. 139.

MONEY HAD AND RECEIVED.

The defendant, who was the captain of the plaintiff's ship, drew, at Rio de Janeiro, a bill on the plaintiff's agents for disbursements. The bill was paid in London, by the plaintiff's agent: Held, that this was not evidence of money had and received by the defendant to the plaintiff's use. *Scott v. Miller*, 3 Bing. N. C. 811.

RESTRAINT OF TRADE.

Held by the Exchequer Chamber, reversing the judgment of the K. B., than an agreement in partial restraint of trade is not void by reason of the party's being thereby restrained from exercising his business in a particular place for his life, and notwithstanding the death of the other party. (1 P. Wms. 181; Noy, 98; 2 Str. 739; 5 T. R. 118; 4 East, 190; 3 Bing. 322; 7 Bing. 735; 1 C. & J. 331.)—*Hitchcock v. Coker*, 1 N. & P. 796. [See *Wallis v. Day*, 2 Mee. & W. 273.]

SLANDER.

These words,—"He has defrauded his creditors, and has been horse-whipped off the course at Doncaster,"—spoken of an attorney, held not actionable, unless spoken of him in his profession. (Com. Dig. Action on the Case for Defamation, D. 27; 2 Ld. Raym. 1480.) *Doyley v. Roberts*, 3 Bing. N. C. 835.

TENDER.

A tender of payment by a purchaser in order to obtain an article purchased, is unnecessary where the vendor admits that the tender would be fruitless. *Jackson v. Jacob*, 3 Bing. N. C. 869.

WORK AND LABOR.

The defendants employed K. to draw a specification of a building proposed to be erected. K. employed the plaintiff to make out the quantities; which work was to be paid for by the successful competitor for the building contract: Held, that they were liable to the plaintiff for making out the quantities. *Moon v. Guardians of the Witney Union*, 3 Bing. N. C. 814.

LEGISLATION.

UNITED STATES.

At the last session of congress, the following important act was passed, providing for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam.

It appears to have been somewhat hastily framed.

It requires certificates to be obtained once in twelve months, expressing the inspectors' opinion of the soundness and seaworthiness of the vessel; but there is no provision requiring an annual license, or requiring the collector to regard the certificate of the inspector, in granting the license. It requires a certificate of the soundness and fitness of the boiler, to be obtained once in six months; but there is no provision for the forfeiture or refusal of a license, in case the certificate is unsatisfactory; though the license is to be forfeited if no certificate is obtained. The certificate of the inspectors' opinion of the soundness and fitness of the boiler, is required to be posted up for public information; but there is no such requisition in relation to that of the soundness and seaworthiness of the vessel. We doubt not, however, that if proper care be taken in the appointment of inspectors, the law will be productive of the most beneficial effects.

Be it enacted, &c. That it shall be the duty of all owners of steamboats, or vessels propelled in whole or in part by steam, on or before the first day of October, one thousand eight hundred and thirtyeight, to make a new enrolment of the same, under the existing laws of the United States, and take out from the collector or surveyor of the port, as the case may be, where such vessel is enrolled, a new license, under such conditions as are now imposed by law, and as shall be imposed by this act.

Sec. 2. *And be it further enacted,* That it shall not be lawful for the owner, master, or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares, and merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, from and after the said first day of October, one thousand eight hundred and thirtyeight, without having first obtained, from the proper officer, a license under the

existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offence.

Sec. 3. *And be it further enacted*, That it shall be the duty of the district judge of the United States, within whose district any ports of entry or delivery may be, on the navigable waters, bays, lakes, and rivers of the United States, upon the application of the master or owner of any steamboat or vessel propelled in whole or in part by steam, to appoint, from time to time, one or more persons skilled and competent to make inspections of such boats and vessels, and of the boilers and machinery employed in the same, who shall not be interested in the manufacture of steam engines, steamboat boilers, or other machinery belonging to steam vessels, whose duty it shall be to make such inspection when called upon for that purpose, and to give to the owner or master of such boat or vessel duplicate certificates of such inspection; such persons, before entering upon the duties enjoined by this act, shall make and subscribe an oath or affirmation before said district judge or other officer duly authorised to administer oaths, well, faithfully, and impartially to execute and perform the services herein required of them.

Sec. 4. *And be it further enacted*, That the person or persons who shall be called upon to inspect the hull of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, give to the owner or master, as the case may be, a certificate, in which shall be stated the age of the said boat or vessel, when and where originally built, and the length of time the same has been running. And he or they shall also state whether, in his or their opinion, the said boat or vessel is sound, and in all respects seaworthy, and fit to be used for the transportation of freight or passengers; for which service, so performed upon each and every boat or vessel, the inspectors shall be paid and allowed by said master or owner applying for such inspection, the sum of five dollars.

Sec. 5. *And be it further enacted*, That the person or persons who shall be called upon to inspect the boilers and machinery of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, make a certificate, in which he or they shall state his or their opinion whether said boilers are sound and fit for use, together with the age of the boilers; and duplicates thereof shall be delivered to the owner or master of such vessel, one of which it shall be the duty of the said master and owner to deliver to the collector or surveyor of the port whenever he shall apply for a license, or for a renewal of a license; the other he shall cause to be posted up, and kept in some conspicuous part of said boat, for the information of the public; and, for each and every inspection so made, each of the said inspectors shall be paid by the said master or owner applying, the sum of five dollars.

Sec. 6. *And be it further enacted*, That it shall be the duty of the owners and masters of steamboats to cause the inspection provided under the fourth section of this act to be made at least once in every twelve months; and the examination required by the fifth section, at least once in every six months; and deliver to the collector or surveyor of the port where his boat or vessel has been enrolled or licensed, the certificate of such inspection; and, on a failure thereof, he or they shall forfeit the license granted to such boat or vessel, and be subject to the same penalty as though he had run said boat or vessel without having obtained such license, to be recovered in like manner. And it shall be the duty of the owners and masters of the steamboats licensed in pursuance of the provisions of this act to employ on board of their respective boats a competent number of experienced and skilful engineers, and, in case of neglect to do so, the said owners and masters shall be held responsible for all damages to the property or any passenger on board of any boat occasioned by an explosion of the boiler, or any derangement of the engine or machinery of any boat.

Sec. 7. *And be it further enacted*, That whenever the master of any boat or vessel, or the person or persons charged with navigating said boat or vessel, which is propelled in whole or in part by steam, shall stop the

motion or headway of said boat or vessel, or when the said boat or vessel shall be stopped for the purpose of discharging or taking in a cargo, fuel or passengers, he or they shall open the safety-valve, so as to keep the steam down in said boiler as near as practicable to what it is when the said boat or vessel is under headway, under the penalty of two hundred dollars for each and every offence.

Sec. 8. *And be it further enacted*, That it shall be the duty of the owner and master of every steam vessel engaged in the transportation of freight or passengers, at sea or on the Lakes, Champlain, Ontario, Erie, Huron, Superior, and Michigan, the tonnage of which vessel shall not exceed two hundred tons, to provide and carry with the said boat or vessel, upon each and every voyage, two long-boats or yawls, each of which shall be competent to carry at least twenty persons; and where the tonnage of said vessel shall exceed two hundred tons, it shall be the duty of the owner and master to provide and carry, as aforesaid, not less than three long-boats or yawls, of the same or larger dimensions; and for every failure in these particulars, the said master and owner shall forfeit and pay three hundred dollars.

Sec. 9. *And be it further enacted*, That it shall be the duty of the master and owner of every steam vessel employed on either of the lakes mentioned in the last section, or on the sea, to provide, as a part of the necessary furniture, a suction hose and fire engine and hose suitable to be worked on said boat in case of fire, and carry the same upon each and every voyage, in good order; and that iron rods or chains shall be employed and used in the navigation of all steamboats, instead of wheel or tiller ropes; and for a failure to do which, they, and each of them, shall forfeit and pay the sum of three hundred dollars.

Sec. 10. *And be it further enacted*, That it shall be the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars.

Sec. 11. *And be it further enacted*, That the penalties imposed by this act may be sued for and recovered in the name of the United States, in the district or circuit court of such district or circuit where the offence shall have been committed, or forfeiture incurred, or in which the owner or master of said vessel may reside, one half to the use of the informer, and the other to the use of United States; or the said penalty may be prosecuted for by indictment in either of the said courts.

Sec. 12. *And be it further enacted*, That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years.

Sec. 13. *And be it further enacted*, That in all suits and actions against proprietors of steamboats, for injuries arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam, shall be taken as full prima facie evidence, sufficient to charge the defendant or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment.

Approved, July 7th, 1838.

THOMAS, LORD COVENTRY,

LATE LORD KEEPER OF THE GREAT SEALE OF ENGLAND.

Some notable Observations in the Course of his Life, and ultimum vale *to the World.*[1]

To trace him in the beginnings and first exposition, hee was the sonne of a judge, and of the Common Pleas, a gentleman by birth and education. The acquirings of his father in the progresse of his profession (as

[1] This memoir of Lord Coventry is taken from an old English Law Magazine, into which it was copied from the original manuscript. The author was evidently a cotemporary of the great lawyer, and although his diction is obsolete, it is thought preferable to present it in its original form, rather than attempt to give it a more polished appearance, which might only weaken its force and impair its authenticity.

it seemes) were not much, and in that accesse (as I may call it,) which commonly men of the law (attaining to that dignitie) leave to their heires in the new erection of a family. Wherefore I conceive it probable, that the sonne did not declyne that profession wherein the father concluded, but began there to buyld on that foundation, where himselfe had made his first approaches.

He was of the inner house of court,[1] and noe soonere by an indefatigable diligence in study attained the barr, but he appeared in the lustre of his profession above the common expectation of men of that form, which he made good in the manifestation of his exquisite abilities soe soone as he came to plead. For the orator at the barr hath much the start of a chamber-man, but he was *in utrumque paratus*, and here hee first began to grow into the name of an active and pregnant man.

Hee marryed and interred his first love in the fruyt of his *primogenitus*, now surviving, a baron and peere of the realme. His wife expiring, hee plighted his faith to the cittie, (for he became recorder by a publique suffrage and suite of the citizens,) and espoused for his second wife,[2] the widow of a citizen, lovely, young, rich, and of good fame, in whom he became the father of many hopefull children of either sexe; all married richly in his life, or left in the waye of a noble substance.

[1] Lord Keeper Coventry was born in 1578, and at the age of fourteen, became a gentleman commoner of Baliol College, Oxford, where he continued three years, and was then entered a member of the Inner Temple. In 14 James I. he was chosen autumn reader of that society; and on the 17th of November, of the same year, was elected recorder of the city of London. On the 14th of March following, he was made solicitor general, and received the honour of knighthood two days afterwards at Theobald's. He was appointed attorney-general by King James I., in the 18th year of his reign.

[2] His first wife was Sarah, daughter of Edward Sebright, of Besford, in the county of Worcester, and sister to Sir Edward Sebright, by whom she had issue, Thomas his successor. By his second wife, Elizabeth, daughter of John Aldersay, of Spurstow, and widow of William Pitchford, Esq. of the city of London, he had four sons and four daughters. Sir John Coventry, the eldest son of this second marriage, was the person upon whom the violent and inhuman outrage was committed by Sir Thomas Sandys, and three others, at the instigation of the Duke of Monmouth, for words spoken in the House of Commons, and which occasioned the act of parliament "*for preventing malicious maiming and wounding*," since called the *Coventry Act*. Elizabeth, the youngest daughter, was married to Sir John Packington, and is said to have been the author of *The Whole Duty of Man*.

Wee may represent his happiness in nothing more than in this, that London had first given him the handsell of a place both honorable and gainefull, together with a wife as loving, as himself was uxorious, and of that sort which are not unaptly styled housewives; soe that these two drew diversely, but in one way, and to one and the selfe same end, hee in the practice of his profession, shee in the exercise of her domestic: for they that knew the discipline of his house averr, that hee waved that care as a contagious distraction to his vocation, and left her only (as a helper) to manage that charge, which best suyted to her conversation.

The next stepp of his, however, was in the service of the late king of ever blessed memorie, as his solicitor, and successively his attorney-generall, both places of trust and of great income; neither did he then leave the cittie, or the cittie desert him, for by the marriage of his eldest son there, (the now baron) hee heaped up to his other acquisitions a bulke of treasure of no common summe, and leaving it so, that it may well fall into the question, whether he was more beholden to the cittie, or the cittie to him; or thus, whether more may be attributed to his fortune than merit. Moreover, they ascribe much to the blessing of his house, that they both were constant in their religion, and serious in their assiduous devotions in the sett and fixed forms of the church prayers, whereunto the whole family were commendably assembled.

In the first year of our now gracious soveraigne, my lord of Lincolne (of the clergy) being removed, Sir Thomas Coventrie was designed at Salisbury for the seale, by the king's most excellent judgment, as the onely person of the times capable of so high a place, with the assistance of the duke of Buckingham, and one that was a noble preferrer of men of meritt; and to the further augmentation of his house, hee was shortly thereupon created baron of Alisbury, in which dignity and place he continued without interruption, until death summoned him to a great pitch of glorie, in an age plentiful in years, abundant in wealth, felicious in offspring, and, that which is more honorable, a noble fame; not that hee passed on unaccused, for envy is a constant follower and persecutor of all greatness, and [*distraction*] an utter enemy of desert.

"The chiefe charge against him was that of Bonham Norton's, wherein the best and

most impartial judgments consent, that his accusor and client was much to blame in the error of his accompt, betweene a judge of equitie and a quondam advocate, and in a case where the accuser had before received ample satisfaction by the advantage and rigour of the law. More than this, I find not much of regard charged on his sinceritie, besides those of vulgar mindes and private interests, where men are ever aforehand in flattery of themselves in opinion of that cause which goes not on their side, and that which hath any relation to their friends.

The character of his outward man was this; hee was of a middle stature, somewhat broad and round faced, of hayre black, and upright in his comportment and gesture; of complexion sanguine, and of comely aspect and presence. Hee was of a very fine and grave elocution, in a kind of graceful lisping, soe that where nature might seeme to cast something of imperfection in his speech, on due examination, she added a grace to the perfection of his delivery; for his words rather flowed from him in a kind of native pleasingness, than by any artificial help or assistance. Hee was of a very liberal accesse and affable, and as he was of a very quick apprehension, soe was he of an exceeding judicious and expeditious dispatch in all affairs either of state or of tribunal; of hearing, patient, attentive, and that which is not usually incident to persons of dignitie and place, seldome in any distempered mood or motion of choler; and it was none of his meanest commendations, that he was a helper or coadjutor, rather than a daunter, of counsel at the barr, and understood better what they would have said in the case, than what sometymes they did say for their clyents; soe that there appeared in his constitution, a kind of natural and unaffected inclination to creep into the good opinion of all men, rather than any affected greatness to discountenance any, but never rashly to discontent many.

Through the whole course of his life, his fortune was so obsequious, that it seemes she always waited upon him with a convoy; for in all the stepps of his rise, he had ever an even and smooth passage, without any rubb or mate in the check.

For his erudition and acquisition of art, (though all knew he was learned in the sciences, and most profound in his profession) yet such was the happiness of his constellation, that he rather leaned to his native strength, than depended on any artificial relyance.

Without doubt hee was of a most solid and immoveable temper, and voyd of all pride and ostentation; neither was he ever in any umbrage or disfavour with his prince; an argument both of his wisdome and sinceritie; neither in any fraction with his equals, worthie of exception: for that of my lord of Suffolke's business, was an art of his that shewed the world, in how little esteeme he held greatness that would justle and stand in competition with justice; and it is remaining among the best of his memorials, that he always stood impregnable, and not to be overcome by might. Amongst all and the many felicities of his life, that of his short sickness, and the willing embracement of death with open armes, were of the most remarkable observation, for it is *finis qui coronat opus*, and changes a mortalitie into that of immortall glorie, for his sickness was not contynued with any lingering or loathesome languishing, nor so precipitate that it bereaved him of the ability of disposing of his estate, to the contentment of his posteritie, or hindered the composing of his thoughts to another and better worlde.

If then in the briefe collection of the state of this noble man's fortune, it may fall into suspicion that I had some relation to his person, or in some one respect or other was obliged to him, I assume the liberty to tender this testimonie to the world, that I never had referrence, at any time, to his service, (onely in such addresses as fell to my lot as a suppliant.) I had ever the honor of a free accesse, with libertie to speak as I could, and as occasion and the cause required, but that which best may satisfye the suspicious, that I have not given myselfe the least scope of partialitie, or flattery, either in favour or affection, it is that I believe noe subject ever suffered in that degree in losse of estate, as I myselfe have endured, and onely by a rule of his owne, in suspending my suyte in the starr chamber, (the cause depending before in chancerie) untill it had there a final determination, whereby I was debarred from detecting as villainous a practice as this age hath heard of, unless I would have waved my chancery suyte without further expectation to be releeved in equitie, which (as I then apprehended) were some conditions of some hard measure, though by good reasons I was

afterwards persuaded, it stood not with the honor of both courts, that two suytes for one and the self same title, should be on foot together; yet was it then informed by his noble successor (and then of my councell) that the cause depending in the starr chamber, was not for the title questioned in chancerie, but for privie combination and practice, committed in a triall at law, some yeares before, at an assise at Sarum; to which his lordship replied, that true it was the tytle was not directly questioned in the starr chamber bill, yet did it conduce thereunto, and so reported by the chiefe baron Walter, that in case the defendant came to be censured by that court, it utterly destroyed both the former verdict, and the tytle in law.

And thus much for myne owne apologie; and soe to proceed: where I must not leave out of the number of his vertues, that he was ever more led by a very noble conduct in the choyce of his servants, which I am bold to say were gentlemen of civilitie, readye to perform all the good offices of urbanitie, in presenting the meanest suytor to their lord, which (as I have taken it as an observation of myne owne) was infused (if I be not deceived) by his own instruction and disciplination.

The faculty of his dispatch in court is best presented in this: that at his first accession to the seale, hee found two hundred causes on the paper ready for hearing, all which, (with such as fell in his way) he determined within the yeare, soe that the clients of the court did not languish in expectation of the issue of their causes.

Where it falls into observation, that this high place is rarely well served, but by men of law, and persons of the deepest judgment, in the statute and common lawes of the land, whereby they may distinguish of cases, whether they lye proper in that court, to be releeved in equitie, without intrenching on the jurisdiction of the kingdome, which is the old inheritance of the subject.

And thus have I briefly traversed the life and fortunes of this noble lord, I shall now close it up in the judgment of some notable personages and counsellors of state, which with one consent, within a few days of his decease, concluded thus:

That the king had lost a most noble servant of state, irreproveable in his place, and in his life and conversation, of a very noble report, and that the kingdom suffered in the losse with the king, in this, that the roome of the chancellor, hath not been supplyed with his life, within the memory of our fathers: and (if report be not injurious to truth) his majesty, in recommending the seale to this noble gentleman, enjoyned him to tread in the stepps of his predecessor. *Memoria justorum remanebit in æternum.*

Now to this little modell of his praise and vertue, I know somewhat of course may be expected to bee said of his vices, for man is composed of humane flesh and frailtie, and the best of men are all subject unto error. *Justus septies in die labitur.*

And who is he that feeleth not in himself the force of his owne corrupt nature, and the contagion of our first father's transgression, streaming through the veines of their infected posteritie? Surely modest men may say, that this noble man had not the privilege of canonization, to bee sainted in earth, and that nothing of blackness could be laid to his eye, during the whole course of his life: but when wee consider his estate, now it is translated to another world, *livor post fatum quiescit*, and that envy which is so emphatically fabled *in avarum et invidum*, becomes checked by the respect of prophanation, and feare of trampling on the sacred ashes of the dead, yet I am not ignorant what murmurs have passed on his integritie tacitly, charging it in implicit tearmes of playing the game dexterously and closely, and that if our faults could be all pencilled in our foreheads, this deceased lorde might then beare in front, sufficient arguments of his humane frailtie.

However, thus much I say, that could he have beene painted to the life, (and I believe it) wee should not find in him much of blemish, and that the maine objection vulgarly inferred on the amassing of his wealth, could not well be done in justice, might be answered to the full in this, that his patromonie considered, and that it was the gainefulness of the places he passed through, together with the great fortune of his owne and his sons intermarriages, all concurring and falling into a frugall family, might soone wipe away all imputations of the most malignant, and perswade even [distraction] itselfe to suffer him to rest in peace, and (as wee may charitably believe) in glorie, as his posteritie surviving, remaines in his honor and fortunes.[1]

[1] He died at Durham House, in the Strand, on the

14th of January 1639—40, and was buried at *Croom D'Abitot*, in Worcestershire, near his father, on the 1st of March following, after holding the seals sixteen years. Lord Clarendon, in his history of the rebellion, has drawn his character with so much force, that we shall conclude with an extract from it. "He discharged all the offices he went through with great abilities and singular reputation of integrity, and he enjoyed his place of Lord Keeper, with an universal reputation, (and sure justice was never better administered) for the space of about sixteen years, even to his death, some months before he was sixty years of age. Which was another important circumstance of his felicity, that great office being so slippery, that no man had died in it before, for near the space of forty years; nor had his successors, for some time after him, much better fortune.

"He was a man of wonderful gravity and wisdome, and understood not only the whole science and mystery of the law, at least equally with any man who had ever sate in the place, but had a clear conception of the whole policy of the government both of church and state, which by the unskilfulness of some well meaning men, justled each other too much. He knew the temper, disposition and genius of the kingdom most exactly; saw their spirits grow every day more sturdy, inquisitive, and impatient; and therefore naturally abhorred all innovations; which he foresaw would produce ruinous effects. Yet many who stood at a distance, thought he was not active and stout enough in opposing these innovations. For though, by his place, he presided in all public councils, and was most sharp sighted in the consequence of things, yet he was seldom known to speak in matters of state, which, he well knew, were for the most part concluded before they were brought to that public agitation; never in foreign affairs, which the vigour of his judgment could well have comprehended; nor indeed freely in any thing, but what immediately and plainly concerned the justice of the kingdom; and in that, as much as he could, he procured references to the judges. Though in his nature he had not only a firm gravity, but a severity, and even some morosity, yet it was so happily tempered, and his courtesy and affability towards all men so transcendant, and so much without affectation, that it marvellously recommended him to men of all degrees, and he was looked upon as an excellent courtier, without receding from the native simplicity of his own manners.

"He had, in the plain way of speaking and delivery, without much ornament of elocution, a strange power of making himself believed (the only justifiable design of eloquence;) so that though he used very frankly to deny, and would never suffer any man to depart from him with an opinion that he was inclined to gratify, when in truth he was not; holding that dissimulation to be the worst of lying: yet the manner of it was so gentle and obliging, and his condescension such to inform the persons whom he could not satisfy, that few departed from him with ill will and ill wishes.

"But then this happy temper and these good faculties rather preserved him from having many enemies, and supplied him with some well-wishers, than furnished him with any fast and unshaken friends; who are always procured in courts by more ardour and more vehement professions and applications than he would suffer himself to be entangled with; so that he was a man rather exceedingly liked than passionately loved; insomuch that it never appeared that he had any one friend in the court, of quality enough to prevent or divert any disadvantages that he might be exposed to. And therefore it is no wonder, nor to be imputed to him, that he retired within himself as much as he could, and stood upon his defence, without making desperate sallies against growing mischiefs, which he well knew he had no power to hinder, and which might probably begin in his own ruin. To conclude, his security consisted very much in his having but little credit with the king; and he died in a season the most opportune, in which a wise man would have prayed to have finished his course, and which, in truth, crowned his other signal prosperity in the world."

CRITICAL NOTICES.

Two charges to the Grand Jury of the County of Suffolk, for the Commonwealth of Massachusetts, at the opening of the Terms of the Municipal Court of the city of Boston, on Monday, December 5, A. D. 1836, and on Monday, March 5, A. D. 1837. By Peter O. Thacher, Judge of that Court. Boston: Dutton & Wentworth, 1837.

The learned judge of the Boston Municipal Court has often favored the public with the publication of his annual charges to the grand jury. Like all his productions, the two charges before us are distinguished for their brevity, and by the simplicity and clearness of their composition. The first in order contains instructions to grand jurors on the performance of their duties; with observations on the provisions of law to guard a citizen from wrongful convictions, and also upon the right of the government to inflict capital punishment. The second relates to the crimes of larceny and embezzlement, cheating by false pretences, forging, and gambling. It contains some observations on the practice of wearing secret arms, and on the influence of the law in preserving the order and peace of society. To this is added a statement of the law relating to the exclusion of atheists from testifying in courts of justice. The following remarks on the last mentioned subject are worthy of attention. "On the subject of oaths, I will remark, that it is an entire mistake to imagine, that in this Commonwealth, any witness is excluded in a judicial hearing, on account of his peculiar sentiments of religious belief. Such exclusion would be an illegal act. But he is excluded, *if he is devoid of all religious belief*, and denies the being of a God. Whether he is a Christian, a Jew, or a Mahometan, is not the material inquiry—much less, whether he is a Calvinist, a Universalist, a Baptist, or a Unitarian. But if he denies the living and true God, the "Father of all" which is the foundation of all religious faith,

and of all practical virtue, he lacks the legal and constitutional qualifications of a witness. For an oath is an invocation of Almighty God to be a witness of the truth. But no person can be compelled, in a court of justice, to declare, whether he believes in God or not. To avow that he is an atheist, would disqualify him from being sworn, and would tend to lessen him in the estimation of his fellow citizens. He may, therefore, I consider, decline to answer the question, 'because no man is bound to accuse or furnish evidence against himself.' Every person of suitable age and discretion, called to testify, is presumed to believe in God, and to have the requisite qualification, until the contrary shall be shown. But if, when called to the stand, it should be proved, that the witness is an avowed atheist, and has repeatedly, unreservedly, and deliberately denied the being of God, and all accountability to Him, the law excludes such person from the oath; and will not suffer the life, the liberty, the fame, or the property of another, to be affected by his testimony. It doth not necessarily follow, I am sensible, that one who is involved in a labyrinth of metaphysical doubt and inquiry, who, without a clear discernment of the truth, and in the perplexity and darkness of his understanding, has inconsiderately denied the being and attributes of God—is an immoral man, and unworthy to be credited in a court of justice. But the law is founded on general principles, and presumes that he who denies the being of God, lacks that religious fear of the consequences of an oath, which has been found in all ages, and among all nations, from the earliest record of history, most powerful to draw forth the secrets of the heart."

Selections from the Court Reports originally published in the Boston Morning Post, from 1834 *to* 1837. *Arranged and revised by the* Reporter of the Post. Boston: Otis, Broaders & Co., 1837.

The great favor with which the reports contained in this volume, were received by the readers of the Morning Post, and by the numerous publications in all parts of the country, into which they were copied, induced the reporter to prepare the present work. He remarks in the preface, with equal truth and candor, "that, as far as it is possible to arrive at truth through the medium of human testimony, the reader may be assured, that, however extravagant or extraordinary some of the cases may appear, they are, nevertheless, truly reported; and although it may be said that, in the embellishments, I have sometimes been indebted to my *memory* for my *jests*, yet certainly it cannot also be said, that I am indebted to my *imagination* for my *facts*. Care has likewise been taken to ensure verbal accuracy in the dialogues, whatever singularity of style, absurdity of notion, or eccentricity of character, may be occasionally exhibited in them. Nothing, I may venture to assert, will be discovered, in the comments I have in many instances introduced, contrary to good morals, good government, or good will toward man."

Although this work is not intended particularly for the profession, it contains such facts and illustrations, in relation to the administration and effect of the criminal law, as can be found in no other place, and the knowledge of which cannot but be productive of great good. We select the following extract from many which we have marked as worthy of particular attention:—

"A short time since, a lad named *David B.* offered some second-hand books for sale at the 'Antique Book Store,' in Cornhill, kept by Mr Burnham, where they were recognized as being books stolen from Mr S. G. Drake's store, next door. The boy was of course arrested, and implicated two other lads, as his confederates—*Daniel O'B.* and *Michael O'B.*—brothers—the former twelve, the latter nine years of age. The boy *B.* was ordered to recognize for his appearance at the Municipal Court in the sum of $120, and warrants issued against the O'B's. who were brought up yesterday, and, having confessed their privity to the theft, were also required to give bonds, and ordered to be committed to jail for want thereof. The mother of the two brothers—a widow—was present, but did not utter a syllable till the examination was concluded, and the result announced, when she arose from her seat, and asked what they were going to do with her boys.

'They must go to jail, unless they can be bailed,' replied three or four voices. 'My children shall not go to jail—they are innocent,' she anwsered. 'That must be for a jury to determine," was all the notice her re-

mark elicited. She then moved in the direction of her boys, and said—'If you take them to jail, you shall take me with them.' 'Don't go to making a fuss about it; they will be well taken care of,' said the officer, interposing to prevent her approach to them; but she glided by his side, and, folding her cloak around her boys, stood literally like the hen gathering her brood under her wings. Apprehending a conflict, yet unwilling to resort in the first instance to physical force, the officers essayed the arts of persuasion, but were unable to prevail over her prejudices by the beatitudes of the prison they so pathetically portrayed. The more they argued, the more they wouldn't be convinced; and the louder they called upon the boys to quit her, the more firmly they clung to her waist, till it became apparent they could not be removed without a scuffile.

The officer laid hands on one of them, but was actually driven from his ground by the screeches of the boys, and the shrieks of the mother. Two officers then advanced towards them with words of honey on their lips, but with bars and bolts in their hearts,—and that they well knew, and again compelled a retreat by the mere power of their yells. It was now evident that the prisoners must be permitted to go at large, the process of the law nullified by screechification, or violence and main strength to be called into action. A fierce struggle ensued. With the tenacity of a tiger, the mother grasped her boys, and they fastened upon her like young wild cats, and the whole three sent up a mingled howl of horrible distress, that was truly appaling. Several times the hands of the officers were upon the boys, but she as often wrenched them back again. Now facing to the right, and then to the left, she kept them at bay, till by the velocity of one of her evolutions, she unfortunately flung the younger lad, that clung to her back, aside upon the floor. Being thus detached from his frantic defender, he fell an easy prey to the enemy, and was instantly led off. She had now but one to protect, and with indomitable strength, agility, and courage, she maintained her resistance, and disputed every inch, utterly regardless or unconscious that the fastenings of her apparel had nearly all given way in the encounter.

The riband with which her cloak was tied beneath her chin remained faithful the longest; but that at last proved treacherous, and with it fell all her hopes of rescuing her only son. By the suddenness of one of her lateral lurches, the little fellow's gripe upon her waist was broken, and, perceiving himself disengaged, he seized her by the cloak. At this moment the mother was inclined backward, and was only supported from falling by her cloak, held by her boy, who also stood in a similar attitude opposite. A constable now attached his weight to the boy's rear, and after pulling and hauling some seconds, 'split the difference between the mother and her son,' drawing with him the cloak, and the mother fell prostrate on the floor, by the force of gravitation. She fell her whole length and heavily, and appeared to be somewhat stunned by the fall; and, before she could rise, her last boy was consigned to the cell.

Perceiving that her desperate struggle had been unavailing, she endeavored to regain her composure and adjust her dress; but her agony was too harrowing to exist without some external note, and, though speechless, and unobservant of the place and its functionaries, she commenced clapping her hands, in the very exasperation of despair. Twice did the order to leave the court fall unheedingly upon her ear, but the third summons she obeyed, and, as all present supposed, left the premises. But five minutes after she was discovered lying senseless, just beyond the door, and, upon being moved, she fell into convulsion, with foam and blood gushing out of her mouth. As soon as a carriage could be obtained, she was removed, in some degree revived and pacified.

By this time the excitement and curiosity occasioned by the singular contest which had taken place had partially subsided, and the spectator had leisure to reflect upon the unutterable anguish he had witnessed. It was an exhibition of *human feeling*—of a mother's affection—blind, perhaps; ignorant, certainly—but yet as human and natural as it was deep and dark. When, exhausted with the affray's toil, and intensity of woe, she reclined against the carriage, pale as death, it was imposible to refrain from inquiring—

> '——— Is it heaven's will
> To try the *dust* it kindled for a day
> With infinite agony?'"

The American Jurist and Law Magazine—Edited by CHARLES SUMNER, LUTHER S. CUSHING, *and* GEORGE S. HILLARD. No. XXXVIII. July, 1838. Boston: Charles C. Little and James Brown.

The present number completes the nineteenth volume of this able and justly distinguished magazine. Although a journal of this character must necessarily be sought for by a comparatively small portion of the community, we are glad to learn that the Jurist has always had a pretty extensive circulation, and that the number of subscribers is constantly, though slowly, increasing. Since the work has been under the supervision of the present editors, its character has been changed, and very much improved. It is issued with the regularity of the leading and long established Reviews; and the typographical execution of the two last numbers is unequalled, we think, by any periodical in the country. The contents of the present number are as follows:—

Article 1, On the Law of Possession; 2, On the origin of various kinds of Dower; 3, the Insolvent Law of Massuchusetts; 4 Criminal proceedings of Germany, France, and England; 5, Effect of the Statute of Limitations on Trustees; 6, Ray's Medical Jurisprudence of Insanity; 7, Publication of printed papers by Parliament. *Jurisprudence*—1, Digest of English Cases; 2, Digest of British-American Cases; 3, Digest of American Cases. Legislation—Critical Notices — Intelligence and Miscellany — Quarterly list of New Publications—Index.

An Abridgment of the American Law of Real Property, by FRANCIS HILLIARD, Counsellor at Law. In 2 vols. Vol. 1. Boston; Charles C. Little and James Brown, 1838. 8vo. pp. 519.

This is a neat volume, of handsome typographical execution, with notes, references, tables of contents and cases cited; and an index, in the approved style for legal works. The law of real property, in every country, necessarily affects a vast interest. Facility in obtaining a correct knowledge of it, is, therefore, of great importance. Mr Hilliard has, by his abridgment, contributed much to this facility. He has digested the American statute laws of real property under well-known and convenient heads; and has given the substance of, or a reference to, the leading cases on the most important judicial questions, which have arisen under them. The work so far as completed, is a valuable repository of the American law of real property, in that form most interesting to lawyers and business men, to wit, as made definite and certain by judicial decisions.

The plan, utility, and claims of the work may be seen by a few extracts from the author's preface:

"The following work is designed to be for the American lawyer, what Cruise's Digest hitherto has been for him, and still continues to be for the English lawyer. Cruise, although undoubtedly one of the best elementary law books that England has produced, and although hitherto an indispensable part of the library of an American practitioner, has been extensively used in this country, not because it is the book *which is wanted*, but because it is the only one, in any degree answering the purpose, *which could be had*. It is believed that the present work is the first attempt to compile a book, upon the important subject of real property, corresponding in extent and general plan with the English text-book, and at the same time thoroughly American in the materials of which it is composed.

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"It is obvious that in the course of forty years, an immense mass of decisions must have been accumulating in the United States, upon subjects pertaining to real estate. Even where these substantially corroborate the principles of the English law, they are of paramount importance to the American lawyer. And for the innumerable modifications with which, in the various states, they qualify those principles, they are still more indispensable. The present work proceeds upon the plan of *collecting the American cases*, not in the way of merely stating the points decided or copying the marginal notes, but by summarily giving the facts, and often an abstract of the opinion of the Court, either in its own language or otherwise. It is believed—without any accurate enumeration however—that two thirds of the cases cited in this work are American cases, while at the same time few or none of the English decisions are omitted.

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"It is believed, that in the preparation of the present work, the statutes of all the States have been faithfully examined; and

that all their provisions, bearing upon the subject of real property, will be found stated correctly, and with sufficient minuteness to make the work a safe and satisfactory guide. Great care has been used, to avoid giving the present work anything of a *local character;* and to make it alike applicable and useful *in every State of the Union*, where the common law of England is adopted."

MISCELLANY.

DELAYS IN THE COURTS IN SCOTLAND.

At the last session of parliament, the Earl of Devon presented a petition to the house of Lords from Henry Jones, a magistrate and settler in Canada, complaining of the great loss and inconvenience to which he had been subjected, in consequence of his having been detained in Great Britain, pending a suit that had been instituted against him in the court of sessions, Scotland, and praying that steps should be taken to expedite the business of that court. The petitioner stated, that he had now had a suit commenced against him above three and a half years, at a cost of upwards of £200, and that it was not yet brought to a jury trial, although he had purposely refrained from proceedings on his part, which, in promising advantage, might still protract that operation and enhance expense. That, having been brought from the remote extremity of Upper Canada, at much cost and inconvenience, two years since, under the expectation of an early decision, and the assurance that his presence was indispensable, he still saw no defined prospect of a termination to the suit, nor a dispensation of his personal attendance. That the said suit had passed on from term to term without, in the technical phrase, having been overtaken, and being retarded on one occasion by a principal adverse witness absenting himself. That the petitioner could have little hope, in any case, of a favorable termination to his cause, since his opponents, being wealthy persons, might not only protract the suit in the Scotch courts, if the award of the jury should prove unfavorable to them, but bring it, by appeal, before the House of Lords. The petitioner therefore, earnestly prayed the House to take early and efficient steps, by the appointment of additional judges in the court of sessions, by simplifying the modes of appeal, or by such other means as might seem meet, to render justice substantially accessible to all classes of the Queen's subjects, who were too often the victims of protracted torture.

CONTEMPT OF COURT.

The Baltimore American and Commercial Advertiser of the 28th of July, contains the argument, before the Baltimore City Court, of Josiah Bailey, Esq. a member of the Bar of that Court, in support of his answer to an order of the court, in which he was required to show cause why an attachment should not issue against him for contempt. The ground of charge against Mr Bailey was having, as counsel for William Stewart, who is in prison under indictment on a charge of murdering his own father, published in one of the newspapers of that city, an appeal to the citizens, to convince them that Stewart is unjustly suspected of the murder of his father, and that the actual murderer is some other person. The trial of Stewart had been, previous to the publication of the appeal, postponed by the court, on the application of Bailey, to give time for the public indignation against the prisoner to subside, and for effectual search for any other perpetrator of the crime. The decision of the court on the question of contempt, has not yet reached us.

APPOINTMENTS.

United States.—The Hon. Felix Grundy, member of the Senate from Tennessee, to be Attorney General of the United States.

Massachusetts.—Hon. James C. Alvord, of Greenfield to be one of the commissioners to codify the criminal law of Massachusetts.

The following gentlemen have been recently appointed masters in chancery :—

Frankin Dexter, Edward G. Loring, and Joseph Willard, of Boston, for the County of Suffolk; John J. Clark of Roxbury, for the county of Norfolk; Anselm Bassett of Taunton, for the county of Bristol; William Porter of Lee, and Thomas Robinson of Adams, for the county of Berkshire.

Maine.—Hon. Prentiss Mellen of Portland, Ebenezer Everett of Brunswick, and William Clark of Hallowell, to be commissioners to revise the laws of Maine.